

(25,173)

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1916.

No. 406.

EDWARD BATES, PLAINTIFF IN ERROR,

vs.

LUCIE BODIE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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BODIE
v.
BATES.

Pleas before the Supreme Court of the State of Nebraska, at a Term
Thereof Begun and Holden at the Capitol, in the City of Lincoln,
in said State, on the 3d Day of January, 1916.

Present:

Hon. Andrew M. Morrissey, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

Be it remembered, that on the 27th day of April, 1915, there was filed in the office of the clerk of said Supreme Court of Nebraska a certain transcript. The following is a true copy of the Amended Petition of Lucie Bodie filed in the office of the clerk of the district court of York county on November 24, 1911, as the same appears in the said transcript:

2 STATE OF NEBRASKA,
York County, ss:

Pleas before the District Court of York County, Nebraska, at a Term Begun and Holden in the County of York on the Ninth Day of November, 1914, before Hon. E. E. Good, Judge of said District Court.

LUCIE BODIE, Plaintiff,
vs.
EDWARD BATES, Defendant.

Be it remembered that heretofore, to-wit, on the 24th day of November, 1911, a petition was filed in the office of the clerk of the district court of York County in words and figures following, to-wit:

STATE OF NEBRASKA,
York County, ss:

In the District Court in and for said County.

LUCIE BODIE, Plaintiff,
vs.
EDWARD BATES, Defendant.

Filed in District Court Nov. 24, 1911. I. A. Baker, Clerk.

And now comes said plaintiff and for her amended petition herein alleges that she is, and ever since April 1st last has been a resident of Johnson County, Nebraska; that prior to March 1st, 1911, and for several years she had been a resident of Benton County in the state of Arkansas. In the month of January, 1889, while being a resident of York County in the State of Nebraska, she was married to defendant, and after her said marriage and up until the commencement of the suit below mentioned she conducted and demeaned herself towards said defendant in a dutiful, chaste and wifely manner. Soon after her said marriage to defendant, he became addicted to drinking intoxicating liquors to excess, and would very frequently get drunk, and go off on a drunken spree, and this plaintiff would be compelled to and did, send after him and frequently have him brought home in a drunken condition, and filthy, and plaintiff be compelled to clean up the furniture and clothing soiled by the filth he would produce and plaintiff did so clean up after him very often, and this habit of defendant continued to grow worse, and his drunken sprees became more frequent, as the time passed, but this plaintiff continued to do her duty in her attempts to take care of defendant, and used her best endeavors to persuade and induce this defendant to cease his drunken sprees, but without avail. During such drunken sprees he became very abusive and would use coarse and indecent language to and in the presence of this plaintiff until her position became almost unbearable.

Some time before the 1st day of March, 1911, while plaintiff and defendant were living in Benton County in the State of Arkansas, without any just cause therefor, this defendant commenced a suit against this plaintiff in the Court of Chancery of Benton County, Arkansas for divorce upon the alleged grounds of Indignity, cruel and infidelity. On being served with summons in that cause this plaintiff as a defendant in that cause, filed her answer and cross-complaint, or cross-bill, in which she denied the allegations in the bill or complaint of the plaintiff in that cause, and alleged as grounds for her prayer for a divorce and an allowance of and for alimony, the facts of said plaintiff's drunkenness and his cruel and unmanly treatment of this plaintiff, the defendant therein, amounting to gross indignity and alleging in general terms the amount and value of the property of the plaintiff in that suit. Among other property alleged to belong to said plaintiff in that suit, this plaintiff as the cross complainant in that suit alleged that said plaintiff owned

the lands situated and lying in York County, Nebraska, known and described as follows:

4 The east half of the south east quarter of section seven (7) the south-west quarter and the south half of the north-west quarter of section eight (8) all in township ten (10) North, in range two (2) West, in York County, Nebraska. The cross-complaint further alleged that plaintiff in that suit owned property situated in said Benton County of considerable value, consisting of a dwelling house and lot on which the parties resided, and personal property consisting of money, notes, mortgages, furniture, &c.

Said cause was tried in said court of chancery on the first days of March, 1911, and after a full hearing thereof, said court of chancery found the issues in that suit against the plaintiff therein and in favor of the defendant therein who was cross-complainant, and who is plaintiff herein, and entered a decree granting this plaintiff, who was defendant therein, an absolute divorce from the complainant therein, and restoring this plaintiff to her maiden name of Lucie Bodie; a copy of which decree is hereto attached, marked "Exhibit A" and made a part hereof. Said court of chancery further found that the complainant in that suit was justly indebted to the defendant therein for borrowed money amounting to \$2,500.00; that the value of said house and lot was \$2,500.00, and that complainant's personal property was of the value of about \$7,000.00, and that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the state of Arkansas, and that in consequence of that fact in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into the account the above mentioned property situated in York County, Nebraska. Said Court was limited by the laws of Arkansas from taking into consideration said property lying in York County, Nebraska, in determining the amount of alimony that should be granted to defendant in that suit, who is plaintiff herein.

5 The laws of the State of Arkansas then in force, among other things, provides as one of the grounds authorizing the Courts of Chancery to grant a divorce as follows:

"Where either party has been addicted to habitual drunkenness for the space of one year, or shall be guilty of such cruel or barbarous treatment as to endanger the life of the other, or shall offer such indignities to the person of the other as shall render his or her condition intolerable."

The laws of the State of Arkansas further provide:

"Where the divorce is granted to the wife each party is restored to all property not disposed of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration, or by reason thereof; and the wife so granted a divorce from the husband, shall be entitled to one third of the husband's personal property absolutely, and one third of all lands of which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form."

"Circuit courts have general equity jurisdiction as at common law, except in the County of Pulaski, and where separate chancery courts have been established by law."

Plaintiff further alleges that in the circuit of which Benton County, Arkansas, is a part, a regular chancery court has been established by law.

Plaintiff further alleges that the above and foregoing provision of the laws of Arkansas is the only provision providing for allowance of alimony to the wife in case of divorce.

Plaintiff further alleges that when said cause so commenced in the chancery court of Benton County, Arkansas, was tried during the first days of March, 1911, and when the same was determined,

and as a part of said finding and decree entered therein, it
6 was ordered and decreed that defendant in that cause should
recover from the plaintiff therein the said sum of \$2,500.00
of money borrowed as above mentioned as found, and that she should
be and was decreed as alimony one third in value of said plaintiff's
personal property, and the present value of her life interest in one
third of the value of said house and lot, and the Court further found
and decreed that the said sum of \$2,500.00 borrowed money, the
one third in value of said personal property, and the present value of
defendant's life interest in one third of the value of said house and
lot all together aggregated the sum of \$5,111.00, which sum was
allotted and decreed to her, together with certain articles of furniture,
which originally belonged to her.

This was the only allotment made to or for defendant in that suit, who is the plaintiff herein, and said Court of Chancery was limited and prohibited from taking into account in determining said amount of allowance to said defendant, the said lands lying and being in York County, Nebraska, or their value, and the only amount of alimony allowed said defendant was the sum of \$2,611.00, being the balance of said sum \$5,111.00 left after deducting the \$2,500.00 of borrowed money due defendant from said complainant, as above alleged.

This plaintiff alleges that said lands situated in York County were owned by this defendant, who was complainant in the above mentioned suit, at the time that said suit was commenced and at the time said decree of divorce was entered, and the said lands were well and reasonably worth \$150.00 per acre, and in the aggregate were worth at least \$48,000.00. And the amount of alimony so allotted and allowed to this plaintiff in that suit is largely inadequate and insufficient for the support of this plaintiff, and is not such fair proportion
7 of the property of this defendant, owned by him at the date
of said decree of divorce, as this plaintiff then was and still is
entitled to in view of all the circumstances surrounding this
case and the services and hardships endured and performed by this
plaintiff for this defendant.

Wherefore this plaintiff prays that this Court will take cognizance of this whole matter; that on a full and final hearing herein this Court will grant, allow and adjudge and decree to this plaintiff a reasonable sum out of the value of the defendant's property located

in York County, Nebraska, and above described, as and for alimony to which she is entitled, in addition to the said amount so allowed in and by the said court of chancery of Benton County, Arkansas; and that this defendant be restrained and enjoined from transferring or otherwise disposing of said lands until said amount of additional alimony is fully paid; and that this Court will grant unto this plaintiff such other and further order or decree as she may be entitled to in law or equity, and that she may recover such fair and reasonable sum from defendant as Attorneys' fees for her attorneys for their services, as the Court may find to be reasonable, to be taxed as costs and that defendant be required to pay the costs herein and that execution may issue therefor.

GILBERT BROTHERS AND
S. P. DAVIDSON,
Attorneys for Plaintiff.

8 STATE OF NEBRASKA,
Johnson County, ss:

Lucie Bodie, after being sworn in due form says she is the plaintiff in the above cause, that she has heard the foregoing amended petition read, and the allegations therein contained are true as she believes.

LUCIE BODIE.

Subscribed in my presence and sworn to before me this 20th day of November, 1911. My commission expires on the 23d day of Aug., 1917.

[SEAL.]

N. M. DAVIDSON,
Notary Public.

EXHIBIT A.

In the Benton County Chancery Court.

EDWARD BATES, Plaintiff,
vs.
LUCIE BATES, Defendant.

On this day this cause came on to be heard upon the complaint of the plaintiff, the answer and cross bill of the defendant and plaintiff's answer to said cross-bill and documentary and oral proof adduced, and said depositions taken in said cause.

And the Court after hearing same and being well advised in the premises doth dismiss plaintiff Bills for want of equity and doth grant a divorce on the cross-bill of the defendant herein.

It is ordered, adjudged and decreed by the Court that the defendant Lucie Bates have and recover of and from the defendant Edward Bates the sum of \$5,111.00, in full of alimony and all other demands set forth in the cross-bill, which judgment is rendered by the

consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment decree herein rendered.

9 It is further ordered, adjudged and decreed by the Court that the defendant, Lucie Bates, have the following personal property now in the residence of Edward Bates at Siloam Springs, Arkansas: that is to say, such silverware as has been purchased since the marriage of plaintiff and defendant. One side-board and china cabinet; one chiffoneer; one mattress; one half of the quilts and comforts; one leather rocker; one wicker rocker; two birds eye maple chairs; one water tankard and such china as is her separate property.

It is further ordered and decreed by the Court that a lien be declared on the following real estate in Benton County Arkansas owned by Plaintiff to secure payment of said judgment; Lot No. 9, Block No. 8, Beauchamp's addition to the city of Siloam Springs, Benton County, Arkansas; and that the defendant place with the clerk of this court the following notes and mortgages herein above referred to; and as additional security that the plaintiff place with the clerk of this Court four notes of \$280.00 each or a total of \$1,120.00. One note for \$89.60. One note for \$112.00, the same having been given by one Shockey to Edward Bates. One note for \$500.00 and two notes for \$40.00 given by Ida and W. S. Tibbs to Edward Bates. One note for \$400.00 given by Richard O. Forman to Edward Bates; one note for \$500.00 given by Norris and Yonkers, being a total of \$2,801.06, which are by the said Edward Bates, in open court deposited with the said clerk, all of which notes are secured by mortgages.

It is understood and agreed that the said Edward Bates may sell and dispose of any and all of said property, including real estate and notes, but upon the sale of same he is to deposit the proceeds arising from said sales with the clerk of this court until he had paid the sum of \$5,111.00 together with 6% interest on the same up to the time of such payment.

10 It is further ordered and adjudged by the court that no execution issue on this judgment for six months from this date and that such judgment bear interest at the rate of 6% per annum from date until paid.

It is further ordered by the Court that both plaintiff and defendant may withdraw all exhibits filed in said cause, and the plaintiff may withdraw the testimony given by him and taken in shorthand by W. F. Cline, Notary Public.

The Court finds from the evidence that the defendant's maiden name was Lucie Bodie and it is ordered and adjudged by the Court that she is restored to her maiden name.

It is further ordered and adjudged by the Court that plaintiff pay all costs in this suit laid out and expended.

It is further ordered and adjudged by the Court that the bonds of matrimony entered into by and between plaintiff and defendant be dissolved, set aside and held for naught.

STATE OF ARKANSAS,
County of Benton:

I, W. W. Heaslet, Clerk of the Chancery Court do hereby certify that the above and foregoing is a true and perfect copy of the judgment and decree rendered in the above entitled cause March 2nd, 1911, as the same appears *of record* in Chancery Record "M" at page 596.

Witness my hand and seal of said Court this 7th day of March, 1911.

[SEAL.]

W. M. HEASLET,
Clerk of the Benton Chan. Court.

Filed in District Court Dec. 8, 1911. I. A. Baker, Clerk.

11 On the 20th day of May, 1912, there was filed in the office of the clerk of the supreme court of Nebraska in the case of Bodie v. Bates, No. 17601, a transcript of the proceedings in said case had in York county, Nebraska. The following is a true copy of the Demurrer filed in said district court of York county by Edward Bates, defendant, as the same appears in said transcript:

And afterwards, towit: On the 8th day of December 1911 there was filed a demurrer of the defendant in the words and figures following:

In the District Court of York County, Nebraska,

LUCIE BODIE, Plaintiff,
 vs.
 EDWARD BATES, Defendant.

Demurrer.

Comes now the defendant and demurs to the petition of the plaintiff herein for that said petition does not state facts sufficient to constitute a cause of action.

EDWARD BATES, *Defendant,*
 By FIELD, RICKETTS & RICKETTS,
 And W. L. KIRKPATRICK,
His Attorneys.

12 And, on the 8th day of April, 1912, there was made in said district court of York county and entered on the journal thereof, a certain Order. The following is a true copy of said Order as the same appears in said transcript filed in the supreme court of Nebraska on May 20, 1912:

And be it further remembered that afterwards to-wit: on the 8th day — April 1912 there was made and entered on the Journal of this court the following order in the above entitled cause:

EDWARD BATES VS. LUCIE BODIE.

LUCIE BODIE, Plaintiff,
vs.
EDWARD BATES, Defendant.

Ruling on Demurrer.

Now to-wit: this 8th day of April 1912 the same being a day of the regular March 1912 term of the district court in and for York county, Nebraska, this cause came on to be heard on the final ruling on the demurrer of the defendant to the amended petition of the plaintiff the same having been heretofore argued, submitted and taken under advisement by the court. And the court being fully advised sustains said demurrer, to which ruling the plaintiff excepts.

And plaintiff refusing to plead further the cause is dismissed for want of equity and it is considered by the court that defendant go hence without day and recover costs herein taxed at \$14.35. To all which rulings and judgment plaintiff excepted at the time.

13 And afterwards towit: On the 3d day of April, 1914, there was rendered by said Supreme Court and entered of Record upon the Journal thereof a certain Order in the words and figures following to wit:

Supreme Court of Nebraska, January Term A. D. 1914.

Ap-1 3.

LUCIE BODIE, Appellant,
v.
EDWARD BATES, Appellee.

Appeal from the District Court of York County, No. 17601.

This cause coming on to be heard upon appeal from the district court of York county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed and cause remanded; that appellant pay all costs incurred herein taxed at \$—, and have and recover from appellee all her costs so expended, for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Fawcett, J. Letton, J. concurs in conclusion.

M. B. REESE,
Chief Justice.

14 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain opinion by said court pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

BODIE
vs.
BATES.

Opinion.

Filed April 3, 1914.

1. "The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." *Cochran v. Cochran*, 42 Neb., 612.

2. Where the application of a technical rule of construction would defeat a clear equity, the rule should not be applied.

3. Where consent to the exercise of judicial power in a manner not authorized by statute, is relied upon as a bar to equitable relief demanded in another state, it should be made to clearly appear that the *res* of the equity so demanded was within the contemplation of the consenting parties and was considered by the court when it acted upon their consent. Such consent and the action of the court based thereon should not be extended, by construction, so as to defeat a clear equity of either of the consenting parties in the courts of the other state.

4. Where it clearly appears that in a suit for divorce in a sister state, under the statutes of which the court did not have jurisdiction to take cognizance of real estate then owned by the husband in this

16 state, nor, without consent of the parties, to consider the same in fixing the amount of alimony, and no such consent is affirmatively shown to have been given, and it also clearly appears that the court in allowing alimony to the wife did not take cognizance of or consider such real estate in fixing the amount of such allowance, but allowed the wife a reasonable sum only, based upon the property owned by the husband situated within the jurisdiction of that court, the judgment so rendered is not a bar to an independent suit in this state by the wife, after divorce, to recover a reasonable amount of alimony out of the real estate of the husband situated in this state; nor will the fact that she accepted and has retained the allowance made to her by the judgment of the other court, out of the property of her husband situated within the jurisdiction of that court, estop her from prosecuting such suit.

5. *Eldred v. Eldred*, 62 Neb., 613, and *Cochran v. Cochran*, 42 Neb., 612, examined, and held, to be at variance with each other; and, upon due consideration, and for the reasons stated in the opinion, *Cochran v. Cochran* is adhered to, and *Eldred v. Eldred*, in so far, but in so far only, as it is in conflict therewith, is overruled.

FAWCETT, J.:

From a judgment of the district court for York county, sustaining a general demurrer to her petition and dismissing her suit, plaintiff appeals.

17 The petition alleges that the parties were married in January, 1889, while they were residents of York county, in this state; that soon after their marriage defendant became addicted to drinking intoxicating liquors to excess, and was guilty of continued drunkenness and cruelty until about March 1, 1911, when defendant commenced a suit for divorce from plaintiff in the chancery court of Benton county, Arkansas, to which county the parties had removed, the alleged grounds of divorce being "indignity, cruelty and infidelity"; that, on being served with summons, plaintiff here, defendant in that cause, filed her answer and cross-complaint in which she denied the allegations in plaintiff's bill, and alleged as grounds for a divorce and alimony plaintiff's drunkenness and cruel treatment, and set out in general terms the amount and value of plaintiff's property, including lands situated in York county, in this state. On the trial of the cause the Benton county court found the issues against the plaintiff on his bill and dismissed the same, found for the defendant (plaintiff here), and entered a decree granting her a divorce and restoring to her her maiden name of Lucie Bodie. The petition further alleges that the Arkansas court found that defendant was indebted to plaintiff in the sum of \$2,500. for borrowed money; that defendant's personal property "was of the value of about \$4,000. and that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the state of Arkansas, and that, in consequence of that fact, in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into the account the above mentioned property situated in York county, Nebraska"; that the laws of Arkansas then in force, after stating the grounds for divorce, further provide: "Where the divorce

18 is granted to the wife each party is restored to all property not disposed of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration or by reason thereof; and the wife so granted a divorce from the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all lands of which her husband is seised of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form." The petition alleges that the section of the statute just quoted "is the only provision for allowance of alimony to the wife in case of divorce." It is further alleged that when the case was tried in the Arkansas court during the first days of March, 1911, and when the same was determined, as a part of the finding and decree entered therein, it was ordered and decreed that defendant in that suit should recover from plaintiff the \$2,500. borrowed money, one-third in value of plaintiff's personal property, and the then present value of her life interest in one-third of the value of a house and lot then owned by plaintiff, and that these items

aggregated the sum of \$5,111. which sum was allotted and decreed to her, together with certain articles of furniture which originally belonged to her; that this was the only allotment made to or for defendant in that suit; that that court was limited and prohibited in taking into account, in determining the amount of the allowance to the defendant there (plaintiff here), the lands lying in York county, Nebraska, or their value, and that the only amount of alimony allowed plaintiff was the sum of \$2,611., being the balance of the sum of \$5,111. after deducting the \$2,500 borrowed money. The petition then sets out the value of the York county land at \$48,000., and alleges that the amount of alimony allotted by the Arkansas court is inadequate and insufficient for the support of plaintiff, and is not such fair proportion of the property of defendant,
19 owned by him at the date of the Arkansas decree, as plaintiff then was and still is entitled to, in view of the circumstances surrounding the case, "and the services and hardships endured and performed by this plaintiff for this defendant." The prayer is that the court take cognizance of the whole matter, and that on a full and final hearing it decree to plaintiff a reasonable sum out of the value of defendant's property in York county, "as and for alimony to which she is entitled in addition to the said amount so allowed in and by said court of chancery of Benton county, Arkansas," also for attorney's fees and costs, and for an injunction restraining defendant from disposing of his York county land until the allowance made by the court is paid. Plaintiff attached to her petition and made a part thereof the decree entered by the Arkansas court.

In the decree it is recited that the court, "being well advised in the premises, doth dismiss plaintiff's bill for want of equity, and doth grant a divorce on the cross-bill of the defendant herein. It is ordered, adjudged and decreed by the court that defendant, Lucie Bates, have and recover of and from the plaintiff, Edward Bates, the sum of \$5,111. in full of alimony and all other demands set forth in the cross-bill, which judgment is rendered by the consent of the plaintiff, on condition that no appeal will be taken by defendant from the judgment or decree herein rendered." It then assigns to Mrs. Bates certain specific articles of silverware and household furniture. The decree then provides that, to secure payment of the judgment, a lien be declared on lot 9, block 8, Beauchamp's addition to the city of Siloam Springs, Benton county, Arkansas, and that as additional security the defendant place with the clerk of the court four notes of \$280. each, one note for \$89.60, one for \$112., "the same 20 having been given by one Shockey to Edward Bates, one note for \$500. and two notes for \$40. given by Ida and W. S. Tibbs to Edward Bates, one note for \$400., given by Richard O. Forman to Edward Bates, one note for \$500. given by Norris and Yonkers, being a total of \$2,801.60, which are by the said Edward Bates, in open court, deposited with the said clerk, all of which notes are secured by mortgages." It was then provided in the decree that Bates might sell and dispose of any or all of the property, including real estate and notes, but in making sale he should deposit the proceeds with the clerk until he had paid the full sum of \$5,111. with

interest at 6 per cent. It further provided that Mrs. Bates have restored to her her maiden name of Lucie Bodie.

The grounds upon which defendant based his demurrer in the court below, and seeks to defend the judgment of the court in sustaining the same are: (1) That the Arkansas judgment is a complete bar to a recovery of further alimony. (2) That plaintiff, having accepted and retained the fruits of the Arkansas decree for alimony, is estopped to repudiate that decree. We will consider these two points in the order named.

An examination of the Arkansas statute above set out shows that in that state no provision is made authorizing a money judgment as alimony. The law expressly declares just what interest the wife shall take in both the real and personal property of her husband, where she is granted a divorce. As to real estate, the provision is that she shall be entitled to "one-third of all lands of which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form." It will not, of course, be contended by any one that under

that statute the Arkansas court could have vested in Mrs. 21 Bates, for life, one-third of the lands of which her husband

was then seized located in Nebraska. That provision unquestionably refers to lands situated within the jurisdiction of the court. While the decree is not as specific in its findings as set out in plaintiff's petition in this suit, we think it does sufficiently appear from the decree itself that a portion only of the \$5,111. allowed the defendant was for alimony, and that the balance of the sum allowed was for borrowed money, as alleged by plaintiff in her petition here. The wording of the decree is that Mrs. Bates should recover the sum of \$5,111. "in full of alimony and all other demands set forth in the cross-bill." The term, "and all other demands set forth in the cross-bill," should, in the light of the allegations of plaintiff's petition, as against a general demurrer, be construed as an admission that \$2,500. of the amount allowed by the court was for borrowed money, as alleged. This would leave only \$2,611. allowed as alimony. This fact, in the light of the further fact that Bates at that time owned the Arkansas real estate referred to, and notes secured by mortgages, aggregating over \$2,800., which the court required him to deposit as security for the payment of its judgment, makes it appear to our entire satisfaction that the amount actually allowed by the court for alimony was not more than a fair amount to allow Mrs. Bates out of the property which her husband then owned in Arkansas. In the light of the evidence as to what Bates then owned in Arkansas, it would be idle to claim that that court, in making its allowance, took into account or gave any consideration to the valuable lands then owned by Bates in this state. It is clear, therefore, that, as to the Nebraska land, the rights of the parties were not adjudicated in that action.

It is argued by defendant here that, while the Arkansas court may not have been authorized by statute to enter a money judgment for 22 alimony, it could do so by consent of parties, and that the parties gave such consent. The wording of the decree upon which this argument is based is: "Which judgment is ren-

dered by the consent of the plaintiff, on condition that no appeal will be taken by defendant from the judgment or decree herein rendered." In support of his contention defendant cites *Wood v. Wood*, 59 Ark. 441. In that case a judgment by way of alimony was allowed in the sum of \$33,000. On appeal the supreme court of Arkansas said (p. 448): "In allowing alimony in a gross sum, the court departed from the course usually pursued in such matters, but this was done by consent. She was represented by solicitors, who were acting within the apparent scope of their authority. She has no right to repudiate her acts of record done by them, but she must abide by them, and hold her solicitors responsible, if they were derelict in their duties, or unfaithful to her injury. In rendering a decree in accordance with consent of parties, given by their respective solicitors, no error of law was committed by the court." In the light of that decision, it is argued that the court gave Mrs. Bates a money judgment by consent, and that in such case the remedy would be, ordinarily, by appeal; but it is also said she could not have appealed that case because the court entered judgment, by consent of plaintiff, on condition that she would not appeal. This contention, so far as it goes, is very plausible. If Mrs. Bates had attempted to appeal from that judgment, it is very doubtful if her appeal would have been sustained; but we do not see the application of the case cited, for the reason that there was nothing in that judgment from which Mrs. Bates needed to appeal. The court had adjudicated everything within its jurisdiction, and, apparently, had awarded her a fair allowance out of Bates' property within the jurisdiction of the court.

23 It sometimes happens that technical rules of construction stand out, on one side against plain, undeniable justice on the other. In such a case, what is the duty of the court? In our judgment the question admits of but one answer: Where the application of a technical rule of construction would defeat a clear equity, the rule should not be applied. So, therefore, where consent to the exercise of judicial power, in a manner not authorized by statute, is relied upon as a bar to equitable relief demanded in another state, it should be made to clearly appear that the *res* of the equity so demanded was within the contemplation of the consenting parties, and was considered by the court when it acted upon their consent. Such consent and the action of the court based thereon should not be extended, by construction, so as to defeat a clear equity of either of the consenting parties in the courts of the other state. We are, therefore, unwilling to extend, by construction, either the scope of the consent upon which the Arkansas court acted, or the scope of the jurisdiction of that court in acting thereon.

The learned district court undoubtedly felt bound by the opinion of this court in *Eldred v. Eldred*, 62 Neb. 613. In that case the parties were married in Iowa, from which state they removed to Illinois. Subsequently the husband came to this state, leaving his wife and children in Illinois. The wife applied to the Circuit court in that state for a divorce and alimony. Service was had by publication. The husband did not appear. The wife was granted

a decree of divorce, and the Illinois residence was awarded to her as alimony. Later on she instituted suit in this state for alimony and for the support of two minor children. A decree was entered dismissing the cause, but without prejudice to a future suit for the support of the children. She appealed.

24 In the opinion it is said (p. 614): "The validity of the Illinois decree is not questioned. The court had jurisdiction of the cause, and the decree granting Mrs. Eldred a divorce, being valid there, is likewise valid here. If there had been personal service upon the defendant in the cause, the decree warding alimony would be conclusive upon the parties, and a new suit for alimony by Mrs. Eldred could not be maintained. But the Illinois decree having been rendered upon constructive service and without any appearance on behalf of the defendant, the portion of the decree relating to alimony perhaps is of no validity, save as to the property within the jurisdiction of the court pronouncing it. This suit, then, is not for an allowance out of the property of the defendant for her maintenance, as incidental to some other proceeding or relief. No divorce is sought herein. If the decided weight of authority in this country should be followed, alimony could not be recovered in an independent suit. But this court is committed to the doctrine that courts of equity have jurisdiction to allow alimony to a wife as an independent right where no divorce or legal separation is sought. Earle v. Earle, 27 Neb. 277. This decision would be decisive of the present case had plaintiff not been legally divorced from the defendant, since in the case cited the plaintiff was at the time the legal wife of the defendant, no divorce having been previously granted, nor was one sought in the proceeding for alimony. The marriage relation that existed between the present plaintiff and defendant, has been dissolved by a court of plaintiff's own selection. They are no longer husband and wife. The duty and obligation that once existed to support and maintain the plaintiff does not now rest upon the defendant. He is no longer her husband, and no legal obligation is imposed upon him to provide for her maintenance; hence there exists no right to alimony."

25 If this decision stood alone in our court, or had been subsequently followed, or if we had never sustained a different theory, we might hesitate to announce a rule at variance with the one so plainly stated by the learned chief justice who wrote that opinion. In that opinion Cochran v. Cochran, 42 Neb. 612, is attempted to be distinguished, but the case is not overruled, nor is the soundness of its holding at all questioned.

As we read Cochran v. Cochran, it is at variance with Eldred v. Eldred; and as we consider the two, and compare one with the other, we find the variance so decided that we must now determine which we will follow and establish as the rule in this state. We have no hesitancy in deciding this question in favor of Cochran v. Cochran. The opinion concedes that in Earle v. Earle we have departed from the rule that the allowance of alimony is a mere incident to a suit for divorce, and have awarded alimony in a suit where no divorce was asked. We have held the same in a number

of cases. If, therefore, alimony may be allowed in a suit against the husband where no divorce is asked, then alimony is not necessarily an incident to a divorce suit. If it is not an incident to a divorce suit and inseparable therefrom, then in reason it matters not whether the parties are still husband and wife, or whether that relation has been severed by a decree of divorce. The right to alimony does not depend alone upon the duty of the husband to support his wife. It is not based upon her necessities alone. It is an allowance to her, when her husband has proved recreant, of a just proportion of his (or, more accurately stated, their) estate. Hence, it is a right not solely incident to a divorce suit, but a right which this and many other courts have held is enforceable in a separate

26 and independent suit. *Rhoades v. Rhoades*, 78 Neb. 495, and cases cited on page 497, where it is also said: "And it is clear

that the district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." *Graves v. Graves*, 36 Ia. 310; *Daniels v. Daniels*, 9 Colo. 133; *Galland v. Galland*, 38 Cal. 265, where it is held: "The power to decree alimony falls within the general powers of a court of equity, and exists independent of statutory authority. And in the exercise of this original and inherent power, a court of equity will, in a proper case, decree alimony to the wife, in an action which has no reference to a divorce or separation." *Woods v. Waddle*, 44 Ohio St. 449, where it is held: "A and P. were married in West Virginia at their domicile, where A. retained his domicile, but P. went to Tennessee, where in *ex parte* proceedings, she obtained a divorce *a vinculo* from A., but, as there was no personal service upon A., her application for alimony was dismissed without prejudice and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A., in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause and allowed her alimony. Held, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A." The fact that her application for alimony was dismissed by the Tennessee court without prejudice and to enable her to sue for it elsewhere, is immaterial. If *Eldred v. Eldred* is sound, that fact could not aid her in this state, because of the fact that at the time of applying for alimony in this state she

would not be the wife of her former husband.

27 Let us now see what we held in *Cochran v. Cochran*, *supra*. In that case it appears that Cochran left his wife and family in Wisconsin and came to Nebraska, as his wife thought, on a temporary mission and with the intention of returning to his family. Whether he was actuated by that thought or not, it appears that after coming to Nebraska he decided not to return to his family, but brought a suit for divorce on the ground of desertion, obtained service by publication, complying with all the requirements of law, and obtained a divorce from his wife. About two years later

she instituted suit to recover alimony. In her petition she set out the acts of Cochran in deserting his family, and alleged that she had no knowledge of his application for the divorce until after it had been granted. She did not ask to have the decree which her husband had obtained set aside, nor was it set aside. Yet we held, as appears from the syllabus:

"1. A court of equity will entertain an action brought for alimony alone, and will grant the same, although no divorce or other relief is sought, where his wife is separated from the husband without her fault.

"2. The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute.

"3. A husband deserted his wife and minor children in the state of Wisconsin, where they resided, took up his abode in this state and became a citizen thereof, and procured a divorce from his wife on the grounds of desertion, obtaining service on her by publication. The wife had no knowledge of the divorce proceedings until after the date of the decree. Two years after the date of the divorce the

wife brought suit in equity against the husband for alimony.

28 Held, (1) That the action was not brought under, nor governed by, section 46, chapter 25, Compiled Statutes of 1893, nor by section 602 of the code of civil procedure, but was a separate and independent action based on the legal obligation of the husband to support his wife and children; (2) that the petition stated a cause of action for alimony, although it contained no allegation that the wife and children were in destitute circumstances or in actual need of support.

"4. Our divorce laws are liberal and should be liberally construed; but they are not designed for, and should not be used to enable designing husbands, without cause, to legally discard their wives, whether domiciled in this or other states, or to escape the performance of their marriage contracts."

The venerated Judge Wakeley, who heard the case, rendered a decree in favor of Mrs. Cochran for alimony in the sum of \$2,000, in instalments of \$500. each, and awarded her a further sum of \$250. a year during life. From this decree all parties appealed. The opinion first considers the appeal of the plaintiff's former husband. In that consideration Cox v. Cox, 19 Ohio St. 502; Graves v. Graves, *supra*, Earle v. Earle, *Supra*, and Smithson v. Smithson, 37 Neb. 535, are all approved. In his appeal Cochran urged four grounds for reversal: First. That an action for alimony or maintenance cannot be maintained in this state except as an incident to divorce proceedings, and that as Mrs. Cochran in her petition did not pray for a divorce the court had no jurisdiction of the subject matter of the suit. Second. The statute of limitation, viz., that under section 46 ch. 25, Comp. St. 1893, no proceeding for reversing, vacating or modifying any decree of divorce could be prosecuted after the expiration of six months. Third, that the court was wrong in awarding any alimony whatever to Mrs. Cochran, for the reason that the petition did not show that she or her

29 children were in need of support. Fourth, that the amount awarded Mrs. Cochran was excessive. His appeal was dismissed. The court then took up the appeal of Mrs. Cochran, and said (p. 629): "Her sole ground of complaint is that the amount of alimony awarded her by the district court is too small." It then proceeded to a consideration in detail of the property owned by Cochran, as shown by the evidence, and, after making certain deductions from his real estate, by reason of the fact that some of it was in litigation, found the clear net value of the remainder of his property to be \$23,633. The court then added that it did not think alimony should be awarded in instalments during the life of a party, but held that Mrs. Cochran's appeal should be sustained, but that that portion of the decree of the district court allowing \$250. a year during Mrs. Cochran's life should be set aside, and computed the amount which should be allowed, in the gross sum of \$6,000, payable in three equal annual instalments, and entered judgment modifying the decree of the district court as follows (p. 631): "The decree of the district court as to the amount of alimony awarded Mrs. Cochran is set aside, and a decree will be entered in this court in favor of Mrs. Cochran against Warren Cochran for the sum of \$6,000. alimony, as hereinbefore stated. In all other respects the decree of the district court is affirmed." It will be seen from the above that this court in the Cochran case sustained a suit by the woman, commenced two years after her husband had obtained from her a divorce in strict compliance with the laws of this state, and in which suit she did not ask that the divorce theretofore granted to her husband should be set aside, and which divorce this court did not set aside, and under the general equity jurisdiction, existing in the courts of this state, which it is said are not limited in the exercise of such jurisdiction by statute, it awarded Mrs. Cochran the sum of \$6,000 as alimony.

30 We think our holding in *Cochran v. Cochran* is sound and should be followed; and, in so far as it conflicts therewith, *Eldred v. Eldred* is overruled.

The answer to defendant's second point, viz., that, having accepted and retained the fruits of the Arkansas decree, plaintiff is estopped to repudiate that decree now, is that she is not attempting to repudiate that decree. As in the case of *Cochran v. Cochran*, she is not assailing the legality of the divorce, nor is she questioning the adequacy of the allowance made to her out of the property within the jurisdiction of that court. We therefore hold that the decision of the Arkansas court is not res judicata here, and that the acceptance and retention by Mrs. Bates of the allowance made her in that case does not estop her from maintaining the present suit.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in harmony with this opinion.

Reversed.

Letton, J., concurs in the conclusion.

31 And, on the 15th day of August, 1914, there was filed in the office of the clerk of the district court of York county, the Answer of Edward Bates to the amended petition of Lucie Bodie, plaintiff. The following is a true copy of said Answer as the same appears in the transcript which was filed in the office of the clerk of the supreme court of Nebraska on April 27, 1915:

32 And afterwards, on the 15th day of August, 1914, there was filed in the office of said clerk an answer in the words and figures following, to-wit:

In the District Court for York County, Nebraska.

LUCIE BODIE, Plaintiff,
vs.
EDWARD BATES, Defendant.

Answer.

Filed in District Court Aug. 15, 1914. Fred Strobel, Clerk.

First Defense.

Comes now the defendant Edward Bates and for answer to the plaintiff's amended petition herein filed, admits that the plaintiff and defendant were married on or about the 1st day of January, 1889; admits that the plaintiff obtained a decree of divorce from this defendant by the consideration of the Chancery Court of Benton County, Arkansas, in 1911, a copy of which decree is attached to plaintiff's petition; admits that the defendant at the time of said divorce proceeding owned a house and lot in Benton County, Arkansas, of the value of about \$2,500, and that he owned personal property of the value of about \$4,000 as alleged in the plaintiff's petition; admits that this defendant then held the legal title to 320 acres of land in York County, Nebraska, described in the plaintiff's petition; and denies each and every other allegation set forth and alleged in plaintiff's petition, except as may be hereinafter expressly admitted or modified.

Second Defense.

The defendant alleges that he now is and at all times since the 1st day of January, 1910, has been a resident and citizen of the State of Arkansas. And at no time within the period above named was the defendant a resident or citizen of the State of Nebraska, nor was he domiciled at any time during said period in York County, Nebraska.

33 The defendant further alleges that at all times between the 1st day of January, 1910, and the 2nd day of March, 1911, the plaintiff in this action was a resident and citizen of Arkansas and maintained a domicile in said state. Shortly after

March 2nd, 1911, the plaintiff located her residence and domicile in Johnson County, State of Nebraska, and resided in said county at the time of the commencement of this suit. Neither at the time of the commencement of this suit nor at any time subsequent thereto was the plaintiff a resident of York County, Nebraska. At the time of the commencement of this suit the plaintiff had been a resident of Nebraska for a period of less than six months.

By reason of the facts above alleged, the district court of York County, Nebraska, was, and is without jurisdiction to hear and determine the question of plaintiff's right to additional alimony, either under the statute governing the subject of divorce and alimony, or the general jurisdiction of the Court.

Third Defense.

This defendant shows to the Court that the county of Benton is one of the duly organized counties of the state of Arkansas; that under the laws of the State of Arkansas a Chancery Court having general equity jurisdiction as well as jurisdiction of the subject of divorce and alimony, convenes and sits at certain periods during the year in Benton County, Arkansas, and is known as the Chancery Court of Benton County, Arkansas.

On and prior to the 1st day of January, 1909, the plaintiff and defendant were each residents and citizens of Benton County, Arkansas. Prior to the month of June, 1910, they resided together as husband and wife. On or about the 14th day of June, 1910, this defendant, as plaintiff, filed his petition in the Chancery Court for Benton County, Arkansas, versus the plaintiff in this suit, in which this defendant sought to recover a divorce from the plaintiff in this suit; a copy of which petition is hereto attached and herewith filed and made a part of this answer, to the same extent and in the same manner as if fully set forth herein, and marked "Exhibit A."

On or about the 29th of June, 1910, the plaintiff in this suit, defendant in the divorce proceedings instituted by this defendant in the Chancery Court of Benton County, Arkansas, filed her answer to the petition that had been filed by this defendant; and by way of cross-petition alleged facts, which if found to be true, would have entitled her to a divorce from this defendant under the laws of the State of Arkansas. Among other things she alleged in her cross-petition as a basis for the recovery of alimony that this defendant owned real and personal property of the reasonable and fair value of \$75,000.00, part of which consisted of 320 acres of land situated in York County, Nebraska, being the land described in plaintiff's petition, together with other property situated in Oklahoma and Arkansas; a copy of which answer and cross petition is hereto attached and herewith filed and made a part of this answer and marked "Exhibit B."

On or about the 14th day of July, 1910, this defendant filed an answer in the Chancery Court of Benton County, Arkansas, to the cross-petition that had been filed by the plaintiff, defendant in

that action. In his answer this defendant admitted that he owned certain property alleged in the gross-petition to be owned by him. He also admitted that the legal title to the property in York County, Nebraska, described in the cross-petition, stood in his name; but alleged that he held the legal title to one half of said property in trust for the use and benefit of his two daughters and a son by a former marriage. A copy of said answer is hereto attached and herewith filed and made a part of this answer, and marked "Exhibit C."

35 On or about the 14th day of July, 1910, this defendant as plaintiff in the divorce proceeding in Benton County, Arkansas, filed an amended petition in said suit; a copy of which is hereto attached and herewith filed and made a part of this answer and marked "Exhibit D."

On or about the 14th day of July, 1910, the plaintiff filed an answer to this defendant's amended petition in the Chancery Court of Benton County, Arkansas, a copy of which is hereto attached herewith filed, made a part of this answer and marked "Exhibit E."

On or about the 2nd day of March, 1911, the issues formed by the respective parties hereinbefore set forth by this defendant, as plaintiff, and by the plaintiff, as defendant, in the divorce proceedings instituted and pending in the Chancery Court of Benton County, Arkansas, were tried by that Court. In the trial of said issues evidence was offered and received by the Court touching the value of the property owned by this defendant, including the value of the land that stood in the name of this defendant, and situated in York County, Nebraska. Upon full consideration by the Chancery Court of Arkansas of the evidence and the issues in said divorce proceeding, in which said court took into consideration the value of the land that stood in the name of this defendant in York County, Nebraska, in determining the amount of alimony that should be awarded to the defendant in that action; and on or about the 2nd day of March, 1911, entered its findings and decree on the issues made and the evidence adduced by the respective parties, in which the defendant in that action, plaintiff in this action, was awarded a decree of divorce against this defendant and was awarded "the sum of \$5,111.00 in full of alimony and all other demands set forth in the cross-bill" filed in said suit by the plaintiff in this suit. A copy of said decree is hereto attached, herewith filed, made a part of this answer and marked "Exhibit F."

36 On and between the 7th day of March, 1911, and the 11th day of April, 1911, this defendant fully paid the amount of alimony awarded to the plaintiff in this suit, including all costs, of the Chancery Court of Benton County, Arkansas: which was duly received by the plaintiff and receipted for; that a copy of the docket entries showing said payment is hereto attached, herewith filed and made a part of this answer and marked "Exhibit G."

No appeal has been taken from the findings and decree of the Chancery Court of Benton County, Arkansas, as herein alleged and said decree remains in full force and effect, except that the amount

of alimony awarded therein has been fully paid by this defendant and received by the plaintiff.

This defendant alleges that the issues formed, heard and determined by the Chancery Court of Benton County, Arkansas, between the plaintiff and defendant in this suit, defendant and plaintiff in that suit, in which the Chancery Court of Benton County, Arkansas, in awarding to the plaintiff alimony, took into consideration all of the property owned by this defendant; which decree, so far as it relates to alimony, having been fully satisfied, has become a full and complete bar to further proceedings on the part of the plaintiff in this suit, defendant in that, to recover additional alimony under the laws of the State of Arkansas.

Under the constitution of the United States the findings and decree of the Chancery Court of Benton County, Arkansas, as herein alleged and set forth, are entitled to full faith and credit in the courts of the State of Nebraska; and when full faith and credit is given the findings and decree of Benton County, Arkansas, in this court, said findings and decree constitute a full and complete bar to the plaintiff's alleged right to recover additional alimony under the laws of the State of Nebraska.

37 Further answering, this defendant shows to the Court that at the time of the marriage of the plaintiff and defendant in the year 1889 the plaintiff was possessed of no property in her own right other than wearing apparel; and that at no time during said marriage did plaintiff acquire property from any person other than this defendant; and this defendant specifically denies that he was indebted to the plaintiff for borrowed money at the time of the divorce proceedings in Benton County, Arkansas, as set forth in plaintiff's amended petition herein and denies that the Chancery Court of said Benton County, Arkansas, found that he was so indebted to plaintiff, as set forth in plaintiff's petition herein.

And this defendant further alleges that the laws of the Arkansas court in force at the time of said divorce proceeding provided (Sec. 2684 Arkansas Statutes): "An order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof."

Wherefore, This defendant prays first, that it may be found and determined that the District Court of York County, Nebraska, has no jurisdiction to entertain the application of the plaintiff for additional alimony; second, that under the full faith and credit clause of the Constitution of the United States the findings and decree of the Chancery Court of Benton County, Arkansas, may be held to be a complete bar to the plaintiff's action in this case; third, that this defendant may be dismissed and recover his costs.

FIELD, RICKETTS & RICKETTS,
W. L. KIRKPATRICK,
Attorneys for Defendant.

38 STATE OF NEBRASKA,
Lancaster County, ss:

Lowe A. Ricketts, being first duly sworn on his oath says that the defendant making the foregoing answer is now absent from Lancaster County, Nebraska; for which reason this affiant makes this verification. Affiant has read the foregoing answer, knows the contents thereof and believes the matters and facts therein set forth to be true.

LOWE A. RICKETTS.

Subscribed in my presence and sworn to before me this 14th day of August, 1914.

[SEAL.]

F. B. BARBER,
Notary Public.

39

Copy.

EXHIBIT "A."

In the Benton Chancery Court, July Term 1910.

EDWARD BATES, Plaintiff,
vs.
LUCIE BATES, Defendant.

Complaint.

Comes now the above named plaintiff and for his cause of action against the defendant *and* states that he was legally inter-married to the defendant in the year 1900 and that said marriage relation still continues to exist.

The plaintiff has resided in this state for more than one year next before the commencement of this action and that the cause of divorce occurred in this state and within five years next before the commencement of the suit.

That the defendant is guilty of such cruel and barbarous treatment toward the plaintiff and offers such indignities to the person of the plaintiff as to render his condition intolerable.

Wherefore the premises being proven plaintiff prays judgment for a decree of absolute divorce from the defendant.

EDWARD BATES.

40 Copy.

EXHIBIT "B."

In the Chancery Court of Benton Co., Ark., July Term, 1910.

EDWARD BATES, Plaintiff,
vs.
LUCIE BATES, Defendant.

Comes now the defendant, Lucie Bates, and for her defense and answer to plaintiff's complaint herein denies that she is guilty of inflicting upon the plaintiff indignities, and she denies that by her treatment and conduct of the plaintiff she has rendered his life unbearable, but, on the contrary, she charges the facts to be her treatment and conduct of the plaintiff has uniformly been of a kind, considerate and respectful character—and for further defense and by way of demurrer to plaintiff's complaint, the defendant states said complaint does not set forth facts sufficient to constitute a cause of action against her.

Wherefore, the premises being considered, the defendant prays that plaintiff's bill be dismissed for want of equity.

And for further defense and by way of crosscomplaint against the plaintiff, defendant makes the following averments:

That she is now and has been continuously since June, 1906, a resident of Benton Co. Arkansas. That Defendant and plaintiff were lawfully intermarried in the State of Nebraska in the year 1889, since which time plaintiff and defendant lived together as husband and wife until about the 7th day of June, 1910, when the defendant and cross-complainant was by reason of plaintiff's cruel and brutal treatment compelled to leave home. She states and charges that the plaintiff is much addicted to the excessive use of alcoholic liquors and when under the influence of liquor the plaintiff by his conduct and language towards the defendant manifested great disrespect and disregard for the feelings and well being of the defendant and

41 does not hesitate to and does employ language and epithets, names and appellations toward and about the defendant without reason or excuse and for no other purpose than to wound her feelings and humiliate her and to show his utter disregard and supreme contempt for her.

The said Lucie Bates further states and shows that the said Edward Bates for a long time before their separation habitually and without any foundation in fact or truth accused and charged her with infidelity with one George W. Thurman and of being an impure and unfaithful woman and wife. She shows that when she would entreat him to desist in his false and slanderous charges, he would scoff and sneer at her and order her to leave his home and go her way. She further states that the plaintiff Edward Bates, on the 7th day of June 1910, practically forced her by his conduct and slanders to flee her home for protection and she is informed and believes that since that

time hired sleuths have hounded after her in the hope of discovering or of manufacturing evidence detrimental to her good name.

Said Lucie Bates states that she has at all times conducted herself as a good pure and faithful wife and has at no time given the plaintiff any grounds or reason to suspect her purity or to challenge her chastity, and that by reason of his persistent and repeated false accusations her life has been made unbearable.

The said Lucie Bates further shows that the said Edward Bates is the owner of real and personal property of the reasonable and fair value of \$75,000.00 consisting of 320 acres of land in York Co., Neb., described as follows, to-wit:—the S. W. $\frac{1}{4}$ & in Section 7-8 also Town Lots in Custer, Oklahoma, and she further shows that about the year 1902 she became the owner in her own and separate right of \$3,000.00 in money and shortly thereafter she loaned \$2,500. of the same to her said husband, taking his notes therefor bearing interest at the rate of 8% per annum.

42 The premises being considered the said cross-complainant prays that the bonds of matrimony heretofore entered into between herself and the said Edward Bates be dissolved and that he be required to restore to her said sum of \$2,500.00 so borrowed

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from her and 8% interest thereon since July —st, 1902, and that the court award her such alimony as the facts and law warrant, and all other proper or necessary relief.

LUCY BATES, *Defendant,*
By J. A. RICE AND
D. C. SHANNON,
Attys for Defendant.
W. T. MAXWELL, *Clerk.*

Filed June 29, 1910.

Ex. "B."

Copy.

EXHIBIT "C."

In the Benton Chancery Court, July Term, 1910.

EDWARD BATES, Plaintiff,
vs.
LUCIE BATES, Defendant.

Answer to Defendant's Cross-bill.

Comes this plaintiff and denies each and every allegation made by defendant in her cross bill not hereinafter expressly admitted, and for answer says:

That it is true that the defendant is a resident of Benton County, Arkansas, and has been since 1906; that it is true that she and the plaintiff were legally married in the State of Nebraska in the year

1889; but that it is not true that they lived together since that date until the 7th of June, 1910; but that heretofore they separated in the month of April, 1901, and remained apart for the space of about one year.

43 That it is not true that this plaintiff was cruel and brutal in his treatment of the defendant, or that he compelled her to leave her home, and he denies said allegation.

That it is not true that plaintiff is much addicted to the excessive use of alcoholic liquors, and when under the influence of liquors by his conduct and language toward defendant manifest -or has manifested great disrespect and disregard for her feelings and well being, or that he does not hesitate to and does imply language, epithets, names and appellations toward and about the defendant without and for no other purpose than to would her feelings and to humiliate her, and to show his utter disregard and supreme contempt for her, or otherwise, and he denies said allegations.

And by way of answer to the allegations in the cross bill of the said Lucie Bates that the plaintiff has habitually and without foundation and fact, or in truth, accused and charged her with infidelity and adultery and of being impure as a wife, the said Edward Bates states: That the conduct and actions of his said wife with other men has been such as to arouse his suspicions, and that he has frequently remonstrated with her and begged her to desist and refrain from such conduct, but the said Edward Bates states that he has no positive proof of infidelity and adultery on behalf of his said wife, and has frequently told her so, but to say the least of it, her conduct with other men has been very indiscreet and he has so informed her.

And the said EDWARD BATES further answering says:

That it is not true on the 7th day of June 1910 he practically forced the said Lucie Bates by his temper and slanders or otherwise to flee from her home for her protection; that it is not true that he has hired sleuths to hould after her in the hope of discovering and manufacturing evidence detrimental to her good name, and he denies such charge.

44 That it is not *true* that the said Lucie Bates has at all times conducted herself as a good, pure and faithful wife, and he denies said allegation.

That it is not true that the said Lucie Bates has at no time given plaintiff any ground or reason to suspect her purity or to challenge her chastity, and he denies said allegation.

That it is not true by any act or conduct of the said Edward Bates that he has made the life of the said Lucy Bates intolerable, and the said Edward Bates further answering the cross bill of the said Lucy Bates, states:

That it is not true as alleged by the said Lucie Bates that he has been blessed in the accumulation of the goods of this world in the sum of \$75,000.00, but he states to the Court that by industry and economy, he has accumulated the following property. 320 acres of land in the State of Nebraska, one half of which he now owns, the

other half being held in trust for Alberta, Clem E. and Josephus Bates of the probable value of \$50.00 per acre; that he owns no lots in Custer, Okla., but that he owns property at Caddo, Okla., of the value of \$300.00; that he owns property and real estate at Siloam Springs, Arkansas, of the value of \$2,500.00; personal property in Benton County, exclusive of household and kitchen furniture, of the value of \$200.00; household goods of the value of \$1,000.00; moneys, securities, script and other personal property of the value of perhaps \$6,000.00.

In answer to plaintiff's allegation that in the year 1902 she became the owner in her own separate right of the sum of \$3,000.00, the said Edward Bates states that upon the first separation from the said Lucie Bates, he gave her money in the sum of three thousand dollars, and that when they patched up their differences and again resumed the relation of husband and wife, that she returned \$2,500.00 of the same to him, and that since said time he has used

the same in his business; that never at any time did the said
45 Edward Bates comes into possession of any money or property
acquired by the said Lucie Bates from anyone other than
from himself.

And the said Edward Bates further states, that recently, the said Lucie Bates came into possession of a large amount of money and property, as the said Edward Bates is informed, in the sum of \$3,000.00, from the estate of her mother, who is now dead, and the said Edward Bates charges and alleges that the said Lucie Bates is amply financially able to conduct her defense to the action filed by the said Edward Bates herein, and to conduct the prosecution of the cross bill filed by her herein, without drawing upon the estate of the said Edward Bates for that purpose.

Therefore he asks that her prayer for alimony, and for suit money and attorney's fee pendente lite be denied, and prays that upon the final hearing of this case, that the cross bill of the said Lucy Bates be dismissed for want of equity, and that she take nothing by reason of the same, and that the said Edward Bates have the relief prayed in his amended complaint filed in this cause. And will ever pray.

EDWARD BATES,
By WALKER & WALKER,
His Solicitors.

Filed July 14th, 1910. W. T. Maxwell, Clerk.

Copy.

EXHIBIT "D."

In the Benton Chancery Court, July Term, 1910.

EDWARD BATES, Plaintiff,

vs.

LUCIE BATES, Defendant.

To the Honorable T. H. Humphreys, Chancellor:

The plaintiff for his cause of action against the defendant states:

46 That he and the defendant were legally married in the year 1889 in the State of Nebraska; that they have lived together as husband and wife most of the time since their said marriage up until recently; that plaintiff is a resident citizen of Benton County, Arkansas, and has been for more than twelve months next before the filing of his original complaint in this action, which was filed on the 14th day of June, 1910; that his cause of action and grounds for divorce hereinafter alleged, occurred and existed within the State of Arkansas within five years next before the commencement of his original suit herein.

Plaintiff states that he has at all times conducted himself toward the defendant as a faithful, affectionate husband; that he has been true to his marriage vows, and has given the defendant no cause for the many indignities and misconducts which she has heaped upon him, and which are hereinafter set forth.

That the defendant unmindful of her marriageable obligations has been guilty of such cruel and barbarous treatment of the plaintiff, and has offered such indignities to the person of the plaintiff as to render his condition intolerable.

Plaintiff states that he had only known defendant for about six months at the date of their marriage; that as hereinbefore stated, they were married in 1889, and that in the year 1900 the defendant became a Christian Scientist and adopted the teachings and beliefs of Mrs. Mary Baker G. Eddy, much against the advice and protestations of this plaintiff.

That she neglected her duties to the plaintiff, neglected her home life, and that in April 1901 her conduct toward the plaintiff and her treatment of him became so unbearable that they separated, plaintiff leaving her in possession of his home at York, Nebraska, leaving her in a well furnished house, provided for her every want, and the plaintiff left the State of Nebraska and went to Caddo, Ind. Ter., 47 where he engaged in the implement business. That during all his absence from her, which was about one year, he furnished her ample means to properly support her in the station of life to which she as his wife was entitled to live. That the cause of the first separation of the plaintiff and defendant was incapability of temper, that she was peevish, fretful and quarrelsome; that she paid

much more attention to Christian Science than she did to her duties as a wife; that he was informed that she became too familiar with other men, notably with a Doctor by the name of Shadler, who resided in York, Nebraska; that he said Doctor Shadler was a much younger man than plaintiff herein; that she seemed to and did prefer his society than the society of her husband, and disregarded the objections of plaintiff to her receiving attentions from Doctor Shadler.

That afterward, to-wit, in the year 1902, plaintiff and defendant patched up their differences, and that upon her coming to Caddo, Ind. Ter. they resumed their marital relations and lived happily together for the space of about one week, at which time defendant again manifested to a great degree her ungovernable temper that she was peevish, fretful quarrelsome and nagging and made life absolutely unbearable to plaintiff.

That regardless of plaintiff's entreaties to her, she pursued her inclination for Christian Science, and spent most of her time, in fact nearly all of it, in her attentions to Christian Science and its teachings, so much so that in 1904, her mind became unbalanced, and it became necessary to place her in a sanitarium for the treatment of nervous diseases and insanity; that the plaintiff kept her in Puntam's sanitarium in Kansas City, Missouri, during the years 1904 and 1905, Doctor John Punton being the physician in charge, and that this plaintiff cheerfully and willingly paid all the expenses of her treatment amounting to about \$4000.00. That after her release from said Sanitarium, that she and the plaintiff resumed

their marital relations and continued to live together as husband and wife until about fifteen months next preceding the commencement of the original action in this case. That at that time and forever thereafter, defendant refused to cohabit with the plaintiff as his wife, that she was guilty of studied neglect, rudeness and mistreatment of the plaintiff; that she was abusive to him in that she would frequently call him vile names, would call him a vile old man, "an old puppy", and stated to him frequently "I hate you! I hate you!" that she threw slops in his face from a dish pan, and that her course of conduct toward him was such as to make his life utterly miserable.

That the defendant brought her mother to live in plaintiff's home, and that it was a pleasant duty for the plaintiff to provide for her welfare and for her comfort; that while her mother was in plaintiff's home, it became apparent that her physical condition was such that she needed the attention of skilled physicians, and that this plaintiff employed Dr. J. W. Webster and Dr. Clegg of Siloam Springs, men eminent in their profession, to treat the mother of defendant; that he was informed by said physicians that defendant's mother was suffering from an incurable malady, consumption of the stomach, and that all medical science could do was to alleviate her pain and make her declining days as comfortable as possible; that over the objection of plaintiff, the defendant disregarded the treatment and advice of Dr. Webster and Dr. Clegg, and sent to Kansas City for a Christian Science Healer, to wait upon her mother, and that the mother died within two days after the arrival of said Healer.

Plaintiff alleges that the defendant herein claims to be somewhat of a Healer herself, that she treated one Mrs. Swaggerty for cancer, by the Christian Science route, and also claims to have cured one George Thrumen of rheumatism, by the same treatment, much to the annoyance and disgust of plaintiff.

49 Plaintiff states that for some time next before the commencement of this suit, he has been a sufferer from neuralgia of the stomach, and from gall stones, that his physicians Drs. Webster and Clegg, prescribed medicine for his treatment, that at times the plaintiff became utterly helpless, that the defendant refused to administer to him the medicine prescribed by Drs. Webster and Clegg insisting that and telling him "You have no neuralgia of the stomach. You are not troubled with gall stones! You just think you are! You are well!" and refused absolutely to administer to him medicine prescribed by his physician when this plaintiff was unable to administer to himself.

And plaintiff states that for a number of years last past this treatment of him has been one continuous course of studied neglect; of open abuse, of vilification of him, of refusal upon her part to perform her wifely duties, and that his condition in life has been rendered absolutely intolerable by her treatment.

Plaintiff states that he is a man advanced in years, being now 64 years of age; that he has raised a family by his first wife; who are all adults, that there has been no issue by the marriage with the defendant herein.

The premises considered, plaintiff prays that the bonds of matrimony so entered into by and between plaintiff and defendant be annulled, set aside and held for naught, that he be granted an absolute divorce from the defendant, and that he be restored to all the rights and privileges of a single and unmarried person. And will ever pray.

EDWARD BATES,
By R. F. FORREST AND
WALKER & WALKER,
His Solicitors.

Filed July 14, W. T. Maxwell, Clerk.

50

Copy.

EXHIBIT "E."

In the Chancery Court of Benton County.

EDWARD BATES, Plaintiff,
vs.
LUCIE BATES, Defendant.

Defendant's Answer to the Plaintiff's Amended Complaint.

To the Chancery Court of Benton County:

The Defendant, Lucie Bates, for her answer to the plaintiff's amended complaint herein, states: and shows as follows:

She admits the marriage of the plaintiff and defendant at the time and place alleged in the complaint, and that they lived together as husband and wife most of the time since their marriage until a short time before the filing of the original complaint herein; but,

Denies that the cause of action for Divorce alleged in the plaintiff's complaint occurred and existed in the State of Arkansas, and within five years before the filing of the plaintiff's original complaint herein, or at any other place or time.

For further defense the defendant denies that the plaintiff at all times or even most of the time conducted himself toward the defendant as a faithful and affectionate husband.

Further answering the defendant says that she has not sufficient accurate information as to the truth of the plaintiff's allegations that he had, at all times, been true to his marriage vows, upon which to form a belief or to predicate either the admission or denial of the allegation and asks that the plaintiff be held to strict proof of the truth of said allegations.

51 Further answering, she denies that she has, at any time, heaped upon the plaintiff indignities or otherwise mistreated him, as alleged in his amended complaint; and

For further answer and defense herein, this defendant positively and emphatically denies that she has at any time or place been unmindful of her marriage obligation or that she has been guilty of cruel or barbarous treatment of the plaintiff or that she has ever offered or been the occasion of any cause or excuse that would render the plaintiff's condition in life intolerable; and that she denies that she has at any time or place neglected the performance of every reasonable duty and obligation due from her to the plaintiff; or that she has neglected her home life because of her views on the subject of Christian Science or that she has by reason of such views, neglected the plaintiff or mistreated him in any manner whatever; or that she and the plaintiff became separated, as alleged in the complaint, by reason thereof, but,

States and charges the facts to be that said separation was caused and brought about by the intemperate habits and the excessive indulgence in alcoholic liquors upon the part of the plaintiff—together with a mania or mental malady, known in recent years as Wanderlust; and

Further answering she denies that she was peevish, fretful or quarrelsome during the time the plaintiff and defendant lived together as husband and wife; or that she devoted more attention to Christian Science than she did to her duties as a wife; and,

For further answer and defense herein, this defendant most positively denies that she, at any time or place, was either unduly or improperly familiar with any other man or men and especially with one Dr. Shadler of York, Nebraska; and,

52 She states and charges the facts to be, that the plaintiff was not informed that she was as he alleges in his complaint; and she charges this allegation is a false insinuation based upon what he calls information; and that such insinuation is unfair to

her and without any merits or truth whatever; and is only a sample of the wicked sinister methods resorted to by the plaintiff during a great portion of their married life to nag and annoy and render the defendant unhappy.

The defendant admits that after said separation, and after the plaintiff had wandered about over the country until he became weary of doing so, he returned to her and resumed the relation of husband and wife which continued until the plaintiff became impressed that it was his paramount duty and purpose of life to return to and continue to worship at the shrine of Bacchus; and while in this frame of mind he was peevish and unreasonable, disagreeable and intolerable in his temper and habits, during which time this defendant did all that was within her power to make life with him tolerable; and,

For further answer and defense herein, the defendant states that it is not true as alleged in the complaint that her devotion to Christian Science unbalanced her mind or that her tenents and views and practices on the subject of Christian Science contributed in any way toward unbalancing her mind; but,

She states and charges the facts to be that if her mind became unbalanced it was by reason of the treatment received by her at the hands of the plaintiff, producing nervous trouble and prostration, and for which condition he alone was responsible; and that if plaintiff kept defendant in the Punton Sanitarium, as alleged in his complaint, it was rendered necessary because he had not been previously assigned to Pluto's Dungeon.

53 Further answering she denies that she has, at any time, been guilty of any of the neglect, rudeness and mistreatment of the plaintiff alleged in the complaint or that she would frequently call him vile names or that she would throw slop in his face from the dishpan mentioned in his complaint.

This defendant further states that she makes no answer to the plaintiff's allegation as to how he treated her mother or why he did so, for the reason that that matter is not involved in this suit; and,

She further states that the plaintiff has not set forth in his complaint wherein he would be injured by the defendant treating a fellow being for cancer or other maladies by the Christian Science route, or by any other route; and,

For further answer and defense herein, she denies that at any time during the plaintiff's illness while residing with her and when he was drunk or sober, has she refused to administer and care for him as she was in duty bound to do, and to give him medicine according to his physician's directions and orders.

This defendant has fully answered, and asks that the plaintiff's bill be dismissed for want of equity; and that she have judgment for costs herein.

J. A. RICE AND
DEE SHANNON,
Attorneys for Defendant.

STATE OF ARKANSAS,
County of Benton, ss:

Affidavit.

I, Lucie Bates, do solemnly swear that I am the defendant in the above and foregoing cause, and that the foregoing is my answer to Plaintiff's Amended Complaint, and that the statements herein contained are true and correct to the best of my knowledge and
54 belief, so help me God.

[L. S.]

LUCIE BATES,
Defendant.

Subscribed and sworn to before me this 4th day of August, 1910.
 My commission expires Nov. 12, 1912.

J. A. PETTY,
Notary Public.

Copy.

EXHIBIT "F."

In the Benton County Chancery Court.

EDWARD BATES, Plaintiff,
 vs.
 LUCIE BATES, Defendant.

On this day this cause came on to be heard upon the complaint of the plaintiff, the answer and cross bill of the defendant and plaintiff's answer to said cross bill and documentary and oral proof adduced and depositions taken in said cause.

And the Court after hearing same and being well advised in the premises doth dismiss plaintiff's Bills for want of equity and doth grant a divorce on the cross bill of the defendant herein.

It is ordered, adjudged and decreed by the Court that the defendant Lucie Bates have and recover of and from the defendant Edward Bates the sum of \$5,111.00 in full of alimony and all other demands set forth in cross bill which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree herein rendered.

55 It is further ordered, adjudged and decreed by the Court that the defendant, Lucie Bates, have the following personal property now in the residence of Edward Bates at Siloam Springs, Arkansas; that is to say: such silverware as has been purchased since the marriage of plaintiff and defendant. One side board and china cabinet; one chiffon-er; one mattress; one-half of the quilts and comforts; one leather rocker; one wicker rocker; two bird's eye maple chairs; one water tankard and such china as is her separate property.

It is further ordered and decreed by the Court that a lien be declared on the following real estate in Benton County, Arkansas, owned by plaintiff to secure payment of said judgment;

Lot No. 9, Block No. 8, Beauchamp's Addition to the City of Siloam Springs, Benton County, Arkansas, and that the defendant place with the Clerk of this Court the following notes and mortgages herein above referred to; and as additional security that the plaintiff place with the Clerk of this court four notes of \$280.00 each or a total of \$1,120.00. One note for \$89.60. One note for \$112.00. The same having been given by one Shockey to Edward Bates. One note for \$500.00 and two notes for \$40.00 given by Ida and W. S. Tibbs to Edward Bates. One note for \$400.00 given by Richard O. Forman to Edward Bates; One note for \$500.00 given by Norris and Yonkers, being a total of \$2,801.06 which are by the said Edward Bates, in open court deposited with the said clerk, all of which notes are secured by mortgages.

It is understood and agreed that the said Edward Bates may sell and dispose of any and all of said property, including real estate and notes, but upon the sale of the same he is to deposit the proceeds arising from said sales with the Clerk of this court until he has paid the sum of \$5,111.00 together with 6% interest on the same up to the time of such payment.

56 It is further ordered and adjudged by the Court that no execution issue on this judgment for six months from this date and that such judgment bear interest at the rate of 6% per annum from date until paid.

It is further ordered by the Court that both plaintiff and defendant may withdraw all exhibits filed in said cause, and the plaintiff may withdraw the testimony given by him and taken in short-hand by W. F. Conine, Notary Public.

The Court finds from the evidence that the defendant's maiden name was Lucie Bodie and it is ordered and adjudged by the Court that she be restored to her maiden name.

It is further ordered and adjudged by the Court that the plaintiff pay all costs in this suit laid out and expended.

It is further ordered and adjudged by the Court that the bonds of matrimony entered into by and between plaintiff and defendant be dissolved, set aside and held for naught.

EXHIBIT "G."

Chancery Record M. P. 596. 16th day of January Term, March 2, 1911.

No. 80.

EDWARD BATES, Plaintiff,
vs.
LUCIE BATES, Defendant.

Marginal Entry.

Received on within judgment, \$592.00 this Mch. 7, 1911.

F. G. LINDSEY,

Attest:

W. M. HEASLET, *Clerk.*

Received on within judgment \$540.00 this April 3, 1911.

Attest:

W. M. HEASLET, Clerk.

The within Judgment satisfied in full, this April 11, 1911,
\$4025.00 Paid.

LUCIE BODIE,
By F. G. LINDSEY,
Atty of Record.

Attest:

W. M. HEASLET, Clerk.

57

BENTONVILLE, ARK., March 3, 1911.

Received from Edward Bates One Hundred Forty-one and 10/100 Dollars in payment of costs in full of Bates v. Bates.
\$141.00.

W. M. HEASLET, Clerk.

58 And, on the 26th day of August, 1914, the said plaintiff, Lucie Bodie, filed in the office of the district court of York county in said case her Reply. The following is a true copy of said Reply as the same appears in the transcript in said case which was filed in the office of the clerk of the supreme court on April 27, 1915:

59 And afterwards, on the 26th day of August, 1914, the plaintiff filed a reply in the words and figures following to-wit:

STATE OF NEBRASKA,
York County, ss:

In the District Court for said County.

LUCIE BODIE, Plaintiff,
vs.
EDWARD BATES, Defendant.

Reply Filed in District Court Aug. 26, 1914. Fred Strobel, Clerk.

And now comes said plaintiff, and for reply to the answer herein filed, admits that these parties were married in said county of York in January 1889, and while both this plaintiff and defendant were living in and were residents of Siloam Springs, in Benton County, Arkansas, this defendant as plaintiff or complainant filed his bill commencing a suit for divorce from this plaintiff as respondent, in June 1910, that afterwards, and on June 29th, 1910, this plaintiff, as respondent in that suit, filed her answer and cross bill, denying the allegations set out in said complaint as grounds of divorce, and alleging acts of drunkenness cruelty and unmanly and indignant conduct on the part of said complainant in that suit, as grounds for a divorce for which she prayed, and for reasonable al-

lowance as and for alimony and means of support; that afterwards and on July 14 said complainant, defendant herein, filed his amended bill of complaint against said respondent, this plaintiff, alleging various acts of mis-conduct on the part of this plaintiff, as respondent in that suit, as for grounds for a divorce to him from her; that afterwards and on the 14th day of July 1910, this plaintiff as respondent in that suit filed her answer to said amended bill of complaint; and thereafter but on the same day,

July 14, 1910, said complainant in that suit, this defendant, 60 filed his answer to said cross bill of this plaintiff, filed as respondent in that suit, and thereafter, and on the 2nd day of March 1911, said suit was tried to the court of chancery of Benton County, Arkansas, in which said suit for divorce was commenced and pending, and decree entered therein in favor of this plaintiff, as respondent therein, a copy of said decree is attached to and filed with plaintiff's petition herein, and this plaintiff denies each and every other allegation contained in defendant's answer herein.

This plaintiff specifically denies that said court of chancery of Benton County, Arkansas, either had jurisdiction to take the land belonging to defendant Edward Bates, lying and being in York County, Nebraska, into consideration in determining the amount to be allowed respondent in that suit, this plaintiff, or the value of said lands; and plaintiff further denies that said court of chancery did take into consideration in determining the amount of said allowance, said lands or their value, but on the contrary said court of chancery refused and declined to take said lands or their value into consideration in determining the amount of said allowance to said respondent in that suit, this plaintiff and said court of chancery held that it had no power or jurisdiction to consider said lands or their value in making said allowance, but held and adjudged that said court was limited by the statutes of Arkansas to the consideration of the property of complainant in that suit, situated within the limits of the State of Arkansas, and that the statutes of Arkansas provided that the only allowance that could be made by said court of chancery was fixed by said statutes as stated in the amended petition herein.

This plaintiff further replying, alleges that in her cross bill filed in said suit in the chancery court of Arkansas, she alleged that about the year 1902 she became the owner in her 61 own right of \$3000.00 in money and shortly thereafter she loaned \$2500.00 of the same to her then husband, this defendant, taking his notes for the same bearing interest at the rate of 8 per cent per annum and in her said cross bill among other things, she prayed that he said husband be required to restore to her said \$2500.00 so borrowed of her together with interest thereon at the rate of eight per cent per annum; and her said husband, this defendant, in his answer to said cross bill, he among other things alleged that upon their first separation he gave his wife this plaintiff \$3000.00, and when they patched up their differences and again resumed the relation of husband and wife she returned

\$2500.00 of that sum to him and that his said wife never gave him, and he never came into possession of any other money or property acquired by his wife from any other source than himself.

Upon the issue thus presented to said court of chancery a hearing was had and it was by said court regularly and finally adjudicated in favor of this plaintiff, as respondent and cross complainant in said suit, and it was then and there adjudicated that said complainant in that suit, this defendant, was justly indebted to this plaintiff, who was cross complainant in that suit in the said sum of \$2500.00, and that he be and was required to pay her said sum as a part of the allowance of \$5111.00 adjudicated in favor of this plaintiff, as cross complainant in that suit; and this defendant is now barred by said adjudication from raising any question as to how or from whom this plaintiff came to own said \$2500. in her own right.

Wherefore this plaintiff prays that she may be granted the allowance and relief for which she has prayed in her amended petition herein and that the prayer of the defendant be denied.

GILBERT BROS. & S. P. DAVIDSON,
Attorneys for Plaintiff.

62 STATE OF NEBRASKA,
Johnson County, ss:

Lucie Bodie, after being sworn, says on oath that she is the plaintiff in the above entitled cause; that she has heard the foregoing reply read and knows its contents, that the allegations therein contained are true as she believes.

LUCY BODIE.

Subscribed and sworn to before me this 24th day of August, 1914.

[SEAL.] R. F. REYNOLDS,
Notary Public.

63 And, on the 13th day of January, 1915, a certain Judgment, Order and Decree was rendered by the said district court of York county in said action which was filed in said court on January 23, 1915. The following is a true copy of said Judgment, Order and Decree as the same appears in the transcript filed in said case in the supreme court of Nebraska on April 27, 1915:

64 And afterwards, to-wit, on the 13th day of January, 1915, this cause came on for further hearing and the following judgment, order and decree was rendered by the Court:

STATE OF NEBRASKA,
York County, ss:

In the District Court for said County.

LUCIE BODIE, Plaintiff,
vs.
EDWARD BATES, Defendant.

Filed in District Court, Jan. 23, 1915. Fred Strobel, Clerk.

And now on this 13th day of January, 1915, this cause having been tried and submitted to the Court on a former day of this term of court, and taken under advisement by the Court, and the court being now fully advised in the premises, finds for the plaintiff and against the defendant and against the intervenors; and specifically finds that the intervenors, Alberta Bates, Clement E. Bates and Josephine Bates, have no interest in this suit, and their petition of intervention does not contain or allege facts sufficient to entitle them to intervene herein, and that their petition should be dismissed; the Court further finds that the Court of Chancery of Benton County, Arkansas, did not have jurisdiction or authority to take into consideration, in the divorce proceedings mentioned in the pleadings, the lands mentioned in the petition herein lying and being in York County, Nebraska, or their value, in fixing the amount of allowance allotted to the respondent in said divorce proceedings in said court of Chancery, and that said Court of Chancery did not take into consideration said lands or their value nor their rental value in fixing said allowance; The Court further finds that the value of said lands mentioned in the petition belonging to this defendant, which

65 are located in said York County, Nebraska, was at the time said divorce proceedings for divorce suit was determined in said Court of Chancery, and it is at this time, forty thousand (\$40,000.00) Dollars; and the Court further finds that this plaintiff is entitled to additional alimony in the sum of ten thousand (\$10,000.00) Dollars; but that the marriage relation between plaintiff and defendant having been dissolved and the obligation of defendant to support plaintiff having ceased before the commencement of this action, plaintiff is not entitled to any allowance for attorney's fees. Defendant and said intervenors except to each of said findings, and plaintiff excepts to the finding of the amount of alimony to be allowed, as being too small, and much less than should be allotted to her in view of the evidence herein, and also as to the finding that she is not entitled to any allowance as and for attorney's fees.

It is therefore considered, adjudged and decreed that said intervenors take nothing by their petition of intervention, and that their said petition be, and the same is hereby dismissed, and said intervenors except.

And it is further considered, adjudged and decreed that plaintiff have and recover of and from said defendant the said sum of ten thousand (\$10,000.00) dollars, being the amount found due her as

alimony, together with the costs herein incurred taxed at \$— and that execution issue therefor; but it is further adjudged and decreed that plaintiff recover nothing as attorney's fees; to the above finding and decree defendant and each of the intervenors except, and plaintiff excepts to the amount of said allowance as alimony as being too small and less than she should have been allowed under the evidence in this case, and she prays and is allowed an appeal thereon and also upon the denial of any allowance for attorney's fees, and plaintiff is allowed forty days from the rising of the Court to prepare and serve her bill of exceptions; and defendant and each of said intervenors are allowed forty days from the rising of the Court to prepare and serve their respective bills of exception.

E. E. GOOD, *Judge.*

66 And, on the 16th day of January, 1915, there was filed in the office of the clerk of the district court of York county by said defendant, Edward Bates, a Motion for a New Trial. The following is a true copy of said Motion for New Trial as the same appears in the transcript which was filed in the office of the clerk of supreme court of Nebraska on April 27, 1915:

Afterwards, on the 16th day of January, 1915, the defendant filed a motion for a new trial in the words and figures following, to-wit:

In the District Court for York County, Nebraska.

LUCIE BODIE, Plaintiff,
vs.
EDWARD BATES, Defendant.

Motion for New Trial.

Comes now the defendant and moves the Court to set aside the findings and judgment of the court and grant to the defendant a new trial for the following reasons:

1. The Court erred in holding that it had jurisdiction to hear and determine the cause, when one of the parties resided out of the state and the other resided in a foreign county.

2. Because the court erred in holding that the decree of the Chancery Court of Benton County, Arkansas, granting to the plaintiff a divorce and \$5,111.00 in alimony was not a complete bar to this suit for further alimony.

3. Because the court erred in holding that the decree granting to the plaintiff alimony by the Chancery Court of Benton County,

Arkansas, in the suit wherein Edward Bates was plaintiff
67 and Lucie Bodie was defendant, was not under the full faith
and credit clause of the Constitution of the United States a
bar to further litigation for alimony in this suit.

4. Because the court erred in holding that the decree granting to
Lucie Bodie a divorce and alimony by the Chancery Court of Ben-
ton County, Arkansas, was not entitled to the same faith and credit

in the state of Nebraska that it was entitled to in the State of Arkansas under the full faith and credit clause of the constitution of the United States.

5. Because the findings and judgment of the court is contrary to the evidence.
6. Because the findings and judgment of the court is contrary to law.
7. Because of errors committed by the court during the trial of the cause.
8. Because the allowance of the sum of \$10,000.00 alimony to the plaintiff is too great and is in an excessive amount.

FIELD, RICKETTS & RICKETTS AND
W. L. KIRKPATRICK,
Attorneys for the Defendants.

Filed in District Court Jan. 16, 1915. Fred Strobel, Clerk.

68 And, on the 1st day of February, 1915, there was filed in the office of the clerk of the district court of York county in said case a certain Order overruling its motion for new trial. The following is a true copy of the said Order as the same appears in the transcript filed in the office of the clerk of the supreme court of Nebraska on April 27, 1915:

And afterwards, to-wit, February 1, 1915, there was filed by the Court the following Order in this cause:

In the District Court for York County, Nebraska.

LUCIE BODIE, Plaintiff,

vs.

EDWARD BATES, Defendant; CLEM BATES et al., Intervenors.

Order.

Defendants motion for new trial submitted and overruled. Defendant excepts.

Intervenors motion for new trial submitted and overruled. Intervenors except.

Dated this 1st day of Feb., 1915.

E. E. GOOD, *Judge.*

Filed in District Court Feb. 1, 1915. Fred Strobel, Clerk.

39 And afterwards to-wit: On the 15th day of January, 1916, there was rendered and entered on the Journal of said Supreme Court a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1916.

Jan. 15.

LUCIE BODIE, Appellee & Cross-Appellant,

v.

EDWARD BATES, Defendant, and ALBERTA BATES et al., Intervenors,
Appellants & Cross-Appellees.

Appeal from the District Court of York County, No. 19146.

This cause coming on to be heard upon appeal from the district court of York county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed at the costs of appellants, taxed at \$—. For all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Fawcett, J. Sedgwick, J., concurring separately.
Rose, J., dissenting. Barnes and Letton concur in dissent.

A. M. MORRISSEY,
Chief Justice.

70 And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

71

No. 19146.

BODIE
v.
BATES.

Opinion Filed January 15, 1916.

1. In the state of Arkansas divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction. In such cases the courts of that state have no other powers than those expressly conferred by the statute. *Bowman v. Worthington*, 24 Ark., 522.

2. Sections 2681, 2684, Kirby's Digest of the statutes of Arkansas, set out in the opinion, examined and held, that section 2681 applies to cases where a husband obtains a decree of divorce against his wife, and section 2684 to cases where the decree is granted to the wife against her husband.

3. Section 2684, Kirby's Digest of the statutes of Arkansas, examined and held to expressly determine just what interest a wife shall take in both real and personal property of her husband where she is granted a divorce, and that under that statute the Arkansas

court could not have vested in plaintiff in this suit, who was defendant there, an interest for life, or other interest, in the land of which her husband was then seized located in Nebraska.

72 4. The pleadings and decree of the court of chancery in Arkansas examined and held, to have allowed plaintiff, as alimony, the sum of \$2,611 and no more; and that such sum was the amount which she was entitled to receive out of the estate of defendant, located in the state of Arkansas.

5. "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." *Russell v. Place*, 94 U. S. 606.

6. "The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to appear not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined." *Slater v. Skirving*, 51 Neb., 108.

73 7. The evidence in the record, taken in connection with the pleadings and decree in the chancery court of Arkansas, and the then value of the real estate owned by defendant in the state of Nebraska, held, to conclusively show that the court of chancery in Arkansas did not take the Nebraska land into account in fixing the amount of alimony allowed plaintiff.

8. A party cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same party insist that the court did have jurisdiction of that particular property and should have adjudicated in the former action contrary to his contention there made, and so defeat an adjudication thereof entirely.

9. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony allowed plaintiff, and having for that reason refused so to do, its judgment was right and an appeal therefrom would have been unavailing.

74 10. The contention that the decree in this case does not give full faith and credit to the judgment of a sister state is without merit.

11. The opinion on the former hearing in this case, 95 Neb. 757, in so far as it is applicable to the facts now appearing in the record, is adhered to as the law of the case.

75 FAWCETT, J.:

On the first trial of this cause in the district court for York county a general demurrer to the petition was sustained and plaintiff ap-

pealed to this court. We found that the petition stated a cause of action, and the judgment was reversed and the cause remanded for trial. 95 Neb. 757. The trial in the district court after the case was remanded resulted in a decree in favor of plaintiff for \$10,000 alimony. Defendant appeals.

Our former opinion contains quite a full recital of the troubles of plaintiff and defendant, while husband and wife, and a sufficient statement of the issues involved in this suit. The parties were divorced March 2, 1911, in the court of chancery in Benton county, Arkansas, and plaintiff, by the decree in that case was restored to her maiden name of Bodie, which accounts for the difference in the names of the parties in the present suit. As reference will frequently be made in this opinion to the parties as they appear in the Arkansas suit and as they appear in the present suit, we will, for the purpose of avoiding any confusion as to the parties, refer to the plaintiff in this suit, who was the defendant in the Arkansas court, as "Bodie" and to her former husband, defendant in this suit, as "Bates." In the Arkansas court Bates instituted the suit for divorce, alleging infidelity and other misconduct. Bodie denied the allegations of the petition and prayed for a decree of divorce in her favor. She alleged the property of Bates in Arkansas and also alleged that

he was the owner of real estate in Nebraska of the value of
76 \$48,000, and prayed judgment and alimony. Bates and his
counsel there contended on the trial of that suit that under
the law of Arkansas the court in fixing the amount of alimony could
not take into consideration the Nebraska land and allow the wife
alimony on account of the value of such land. This contention was
sound. The rule is settled in Arkansas that "In divorce cases the
court of equity must look to and be governed by the statute, and
cannot exercise inherent chancery powers not provided by the stat-
ute." *Ex parte Helmert*, 103 Ark. 571. "Where by statute juris-
diction over particular subjects of equity is conferred, or given to
common law courts, the entire body of law administered in the equity
courts of this country attaches; but the subject of divorce and all
incidental questions, including alimony and matrimonial causes, are
not subjects of equitable jurisdiction; and in such cases the courts
have no other powers than those expressly conferred by the statute."
Bowman v. Worthington, 24 Ark. 522. See also *Thomas v. Thomas*,
27 Okla. 784. In our former opinion we determined that (p. 762)
"An examination of the Arkansas statute above set out shows that in
that state no provision is made authorizing a money judgment as al-
imony. The law expressly declares just what interest the wife shall
take in both the real and personal property of her husband, where
she is granted a divorce. As to real estate, the provision is that she
shall be entitled to 'one-third of all lands of which her husband is
seized of an estate of inheritance, at any time during the marriage,
for her life, unless the same shall have been released by her in legal
form.' It will not, of course, be contended by any one that
77 under that statute the Arkansas court could have vested in
Mrs. Bates, for life, one-third of the lands of which her hus-
band was then seized located in Nebraska. That provision unques-
tionably refers to lands situated within the jurisdiction of the court."

We also decided that (p. 763) "It is clear, therefore, that, as to the Nebraska land, the rights of the parties were not adjudicated in that action." There is some contention now that our former decision as to the effect of the Arkansas statute and as to the fact that the Arkansas court did not allow alimony on account of the York county land should not be considered as the law of the case because of the evidence which was introduced upon the trial from which this appeal is taken. The Arkansas statute referred to in the opinion, so far as it is pleaded and proven in the case, reads as follows: "And where the divorcee is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof: and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate ~~or~~ inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest, section 2684.

The record now shows that there is a prior section of the statute of Arkansas which provides: "When 78 a decree shall be entered, the court shall make such order

touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest, section 2681. Can these two sections of the statute be construed together, or must they be distinguished and construed to apply to different conditions or situations? That they cannot be construed together is apparent upon their face, for they are directly contradictory. The statute first above quoted, which prescribes specifically what shall be allowed the wife as alimony when she is "so granted a divorce against the husband," is a later statute than section 2681, above quoted. Section 83, p. 936, 1 R. C. L., shows very clearly why section 2681 was enacted by the Arkansas legislature, viz: "According to the rule of the common law, where a divorce was granted for the misconduct of the wife, she was not entitled to alimony. This was productive of so much hardship, however, and so frequently left her a prey to starvation or a life of shame, especially where her own property had become vested in her husband by reason of the marriage, that statutes have been enacted in England and a number of the United States authorizing the courts to make such an allowance of alimony in favor of a guilty wife as the surrounding circumstances may justify." Two of the states cited in this text are Arkansas and Oklahoma. In Ecker v. Ecker, 22 Okla. 873, we have a discussion of this identical section, viz: "The second assignment of error urged is to that part of the master's report recommending that defendant be awarded,

79 and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the state of Arkansas, from which state the statutes in force in the Indian Territory were adopted, the common law has been modified by statute. The statute governing in

this case reads: (The section of the statute quoted in the opinion is a verbatim copy of 2681, Kirby's Digest, under consideration in this case). Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. (Citing cases.) It is, however, a discretion that a court should at all times exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances. In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that

the husband be granted a divorce." The trial court ordered
80 an equal division of the property or that defendant have judg-

ment for one-half of the value of the same. This judgment was held erroneous, the holding being based on section 2568, enough of which is set out to show that that section is a duplicate of section 2684 in this case. In *Pryor v. Pryor*, 88 Ark. 302, it is said: "The first question presented is whether or not the chancery court had jurisdiction to decree an allowance of alimony to a guilty wife against whom a decree for divorce was granted." The court then quotes from 2 Nelson, *Divorce and Separation*, sec. 907, where the question of the allowance of alimony to a wife, when the husband has obtained a divorce, is discussed along the same lines as the discussion in 1 R. C. L., above cited. The court then says: "A statute of this state provides that." The court here quotes section 2681, Kirby's Digest, and then adds: "Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife." The above authorities clearly show just what the legislature intended when it enacted section 2681, viz: that this section was enacted in order to permit the chancery courts of the state to award alimony to the wife in cases where the divorce was obtained at the suit of the husband on account of her misconduct. In such cases the legislature very properly left it to the court to make "such order touching the alimony of the wife and care of the children, if there be any, as from

81 the circumstances of the parties and the nature of the case shall be reasonable." But when, later on in the act, the legis-

lature considers the question as to what a wife shall be entitled to receive when a divorce is granted to her against her husband for his wrongdoing, they enacted section 2684 above quoted. Otherwise, why do they use the language: "where the divorce is granted to the wife," and the further expression "and the wife so granted a divorce against the husband shall be entitled," etc. It is clear that the purpose of the legislature was that the amount which the wife should receive in such a case should not be enshrouded in any uncertainty by leaving it to the discretion of the court to say what should

be a reasonable allowance to her, but fixed the amount, definitely, as to both the real and personal estate. There is nothing ambiguous in this section of the statute. Its terms are too plain to be misunderstood. It is clear, therefore, that the allegation in the petition in this suit that section 2684 of Kirby's Digest, was the only statute in force in Arkansas, at the time of the trial of the suit there, which provided for the allowance of alimony in a case where a divorce was granted to the wife as against the husband, is a correct statement of the law. Section 2681 has no application whatever to such a case. In this manner and in no other can effect be given to each of the two statutes under consideration. It will be seen that the allowance of alimony to the wife, when a divorce is granted for her fault, rests upon an entirely different basis than when the divorce is granted in her favor, and it is common in the United States, as above shown, to make that distinction by statute. There can be no doubt, therefore, that

82 the general rule that a specific statute on a given subject will control as against a general statute that might include the same subject in the absence of a specific statute, applies here, and that the statute quoted in our former opinion, being section 2684, controls the courts of Arkansas in all cases where a divorce is granted in favor of the wife. In such case the court is required to divide the personal property, to give her one-third thereof "absolutely," and to give her a life estate of one-third of the husband's lands. The Arkansas court could not secure to the wife the use of real estate outside of the jurisdiction of the court. In *Wood v. Wood*, 59 Ark. 441, 452, it is said: "Appellant did not undertake to show, in her original or amended bill for divorce, that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than \$200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state. Nothing appears in the record, outside of the evidence, to show that the court committed an error of law in failing to divide the estate of the husband in accordance with the act."

83 We are unable to read that language of the court and reach any other conclusion than that the law of Arkansas limits the jurisdiction of a court of chancery in fixing alimony in a divorce case to property within the jurisdiction of the court. There was then just ground for the contention in the Arkansas court that that court had no jurisdiction to allow the wife alimony on account of the real estate of the husband in Nebraska. Was such a contention made? It is conceded, and the record before us clearly shows, that defendant did, with the help of able counsel, strenuously contend in the Arkansas court that that court could not in that case allow alimony to Bodie on account of the Nebraska lands. And the record also shows that the court did not in fact make any allowance on account of the Nebraska lands. It is shown by the overwhelming weight of the evi-

dence before us that the Arkansas court allowed Bodie \$5,111 "in full of alimony and all other demands set forth in the cross bill." The only demand set forth in the cross bill, outside of alimony, was the restoration to her of \$2,500 which she had loaned to Bates when they were living together as husband and wife. Deduct this sum from \$5,111, and it will be seen that the total amount allowed for alimony was \$2,611. Under the admissions of Bates and the uncontradicted evidence, he, at the time of the divorce trial owned personal property and notes and mortgages within the jurisdiction of the Arkansas court, amounting in the aggregate to \$7,000, and a house and lot, also within the jurisdiction of the court, worth \$2,500.

Under the statute Bodie was entitled "absolutely" to one-third
84 of the \$7,000 of personal property, or \$2,333.33. She was

also entitled to the present value of a one-third interest for life in the house and lot. If we figure that life interest at only \$278, it would make her statutory interest in the property of Bates, situated in Arkansas \$2,611, being the sum allowed as alimony by that court. Hence, it is idle to say that the chancellor considered the Nebraska land in fixing the amount of alimony. If he "considered" it he considered it only to the extent of determining that he had no jurisdiction to take it into account in fixing the amount of alimony. It would be a travesty not only upon the law but upon the commonest principles of justice for us to hold that the chancellor, when he decided the divorce case and allowed Bodie \$2,611 of alimony, took into consideration personal property of the value of \$7,000 and real estate to the value of \$2,500, located within the jurisdiction of his court, and also took into consideration the value of real estate in this state which the decree before us finds was worth \$40,000 at the time the chancellor in Arkansas tried that case. If, in addition to the property within his jurisdiction, he had also taken into account the present value of an estate for life in one-third of land in Nebraska, worth \$40,000, the amount which he would have been compelled to allow would have far exceeded the value of all the property which Bates owned in Arkansas at that time. If he took into consideration the land in Nebraska he was bound to consider it in the light of the law of Arkansas which would require him to allow her a life estate of

85 one-third interest in the Nebraska land. He allowed her, all told, \$2,611. Further comment is unnecessary. *Res ipsa loquitur.*

From what has just been said, it will be seen that defendant succeeded in his contentions in the Arkansas court that that court was without jurisdiction; and prevented any allowance on account of the Nebraska land. He now, in this case, says that his contentions there were unwarranted; that the court did have jurisdiction; and by these inconsistent positions he insists that he has defeated the just claims of his wife. This of course he cannot be allowed to do.

In *Cross v. Levy*, 57 Miss. 634, it was held that a party who had agreed that a justice of the peace had jurisdiction of a case could not afterwards, as against the same party, contend that the justice did not have such jurisdiction. In *Long v. Lockman*, 135 Fed. 197, it was held that a party, who, in a suit in the district court of the

Arkansas district, had alleged that the district court of the Colorado district had exclusive jurisdiction of the case and upon that contention had procured the case to be dismissed by the court of the Arkansas district, could not afterwards be heard to contend against the same party that the court of the Colorado district was without jurisdiction when sued in that district. The court said: "In my opinion, Williams in his lifetime was, and the administrator now is, estopped from denying that his residence was in Colorado when the petition herein was filed. * * * Every element of estoppel is in the evidence, and the evidence on that question is not in conflict. Williams, under oath, said his residence was in Colorado. He received the advantage from that oath. The petitioning creditors acted on it. They filed their petition here. They have incurred much expense by reason of that oath. It cannot now be controverted. * * * I pass those questions by, and hold that this court has jurisdiction upon the grounds of estoppel. And that filing pleadings, offering evidence, making objections, obtaining rulings, and so forth, in one case, may be an estoppel in another case, see the following." (Citing many cases.) A party is estopped to deny facts pleaded to defeat jurisdiction of court. *Caldwell v. Morris*, 120 La. 879, 15 L. R. A. n. s. 423, and cases cited in note. He cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same parties insist that the court did have jurisdiction of that particular property and should have adjudicated it in the former action and so defeat any adjudication thereof entirely.

Is the judgment in the Arkansas court *res judicata*? *Thomas v. Thomas*, 27 Okla. 784, construing an exactly similar statute, cites *Bowman v. Worthington*, *supra*, and quotes with approval the holding in that case above set out; and adds: "The trial court not possessing jurisdiction to entertain the question of the disposition of this property in the divorce proceeding, the same did not become *res adjudicata* by reason of that action, hence is left open for determination in this case."

Matson v. Poncin, 152 Ia. 569, 132 N. W. 970, holds: "A judgment to be available as an estoppel must have decided the particular matter involved in the later suit; it is not sufficient that the same question may have been determined."

In 1 *Herman, Estoppel and Res Judicata*, sec. 252, it is said: "The rule that estoppels must be certain to every intent, and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available either as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters which were not determined. An estoppel by judgment is never inferred unless the basis on which it rests is such as to lead to

the conclusion that the whole subject was litigated and adjudicated." See, also, *Wells, Res Adjudicata*, sec. 223.

In *Packet Co. v. Sickles*, 72 U. S. 580, 592, it is said: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In *Russell v. Place*, 94 U. S. 606, the court, speaking through Mr. Justice Field, said: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention,

unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In *Mercer Co. v. City of Omaha*, 76 Neb. 289, the first paragraph of the syllabus holds. "The rule is well settled, both in this state and elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it is rendered."

Finally we cite *Slater v. Skirving*, 51 Neb. 108. The opinion in this case was by Mr. Commissioner Irvine. It shows a very careful consideration by that talented commissioner of a plea of *res judicata*. Beginning on the fourth line from the bottom of page 112, it is said: "The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a

second action, it must be made to appear not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined; and where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit (eiting case), and we think that while the authorities are conflicting, their greater weight is in favor of the view that the burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence if necessary, and not upon the other party to show that an issue which might have been adjudicated was not."

90 *Slater v. Skirving* cast the burden in this case upon the defendant to sustain his plea by establishing the fact of the actual determination, in the former trial, of the issues involved here, and under the other authorities cited that proof must be clear to the extent of leaving no room for doubt.

Judge Humphreys, who presided at the trial of the case in Arkansas, was called as a witness in this case. He was interrogated as to whether he took into consideration any ownership or equity of Bates in the land in Nebraska. His answer was: "I think I did; it was my intention to cover the whole case." He stated that he was testifying from his best recollection, but a reading of his entire testimony will show that his recollection was not any too clear. Bates, himself, and Mr. Walker, his attorney at the Arkansas trial, both testified that the chancellor took the Nebraska land into consideration in determining the amount which should be allowed Bodie as alimony. This testimony is controverted by the testimony of Mr. Lindsey, Mr. Shannon, Judge McGill, and Judge Davidson, all of whom were present and participating in the trial as counsel for Bodie at the time the chancellor rendered his decision, and by Mr. Heaslet, clerk of the court of chancery in which the case was tried. These five witnesses all testified clearly and explicitly that the chancellor

91 announced from the bench at the time he decided the case that he did not have jurisdiction over the Nebraska land, and could not consider the same. The four lawyers representing Bodie are gentlemen of high standing in the profession of the law, and, with the exception of Judge Davidson, have no present interest in the litigation. Mr. Heaslet was clerk of the court and his testimony stamps him as a candid and truthful gentleman. There is nothing to show that he is in any manner interested in either of the parties to the suit, and it cannot be supposed that he would have any motive in giving testimony about a transaction in the court of which he was clerk, at variance with that given by his presiding judge. When you add to the testimony of these five witnesses the fact that the court could not have taken the Nebraska land into consideration in making his allowance, as hereinbefore shown, the district court before which the suit at bar was tried could not have done otherwise than to credit the testimony of the five witnesses, corroborated by the facts so clearly shown, and discredit the testimony of the three witnesses to the contrary. Under the evidence above set out and the authorities cited, it is clear that the record now before us sustains the allegations in the

petition which our former judgment held stated a good cause of action, and fully sustains every point decided in our former opinion. There is therefore no reason why that opinion should be departed from or in any wise modified.

It is urged that the failure of Bodie to prosecute an appeal from the decree of the Arkansas court is a bar to the present suit. For the reasons above stated this contention is without merit. The 92 Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony, and having refused so to do, its judgment was right and an appeal would have been unavailing. There was nothing to appeal from. Nor is there any merit in the contention that the decree in this case does not give full faith and credit to the judgment of a sister state.

On the trial of this case the learned trial court followed our former decision. He was fully justified under the evidence in doing so and we cannot, without violating every principle of law and justice, reverse his judgment. If he erred at all it was in not allowing Bodie more than \$10,000.

The judgment of the district court dismissing the petition of intervention of the interveners is so clearly right that we shall not spend time discussing it.

The motion of plaintiff for an allowance of attorney's fees is overruled. The judgment of the district court is in all respects affirmed.

93 SEDGWICK, *J.*, concurring:

No one denies that there was at least serious doubt as to the jurisdiction of the Arkansas court to give the wife anything on account of the Nebraska land. Their statutes expressly provided that when the wife obtained the divorce the court should give her one-third of the personal property and the use of one-third of the husband's real estate during her life. The court could not give her the use of real estate that was not within the jurisdiction of the court. That proposition was contested vigorously before the Arkansas court, the husband contending earnestly by his attorneys that the court could not give her anything on account of foreign land, and the court, as is demonstrated from the record, did not give her anything.

It appears conclusively from the record that the Arkansas court allowed her the money which she had loaned to the defendant, and the one-third of his personal property there in Arkansas, and the value of her life interest in the real estate that he had there. These items added together make the exact amount that the court allowed her, so that the record speaks for itself that the Arkansas court did not as a matter of fact give her anything on account of the York county land.

In *Cizek v. Cizek*, 76 Neb. 797, it was decided that "Under section 27, ch. 25, Comp. St. 1905, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on 94 petition of either of the parties." In the opinion the court said: "In the case at bar a good and sufficient reason is shown why the former decree for alimony should be modified. * * *

Having demonstrated that the attempted adjudication of the court upon the question of alimony was nugatory and of no effect, he cannot now be heard to urge it as a final adjudication of the matter." So in this case the defendant on this trial insisted that the court could not give plaintiff anything on account of the Nebraska land. The court did not give her anything. "He cannot now be heard to urge it as a final adjudication of the matter."

95 ROSE, J., dissenting:

The simple question presented by the appeal should have been determined as follows:

An independent suit in equity to recover additional alimony based on defendant's ownership of land in Nebraska should be dismissed, where the uncontradicted evidence shows that plaintiff had procured a divorce and alimony in another state in a court having jurisdiction to consider the Nebraska land in awarding alimony, that both parties had appeared therein in person and by counsel, that each had asked for affirmative relief and that the value of defendant's interest in the Nebraska land had been made the subject of pleading, proof and argument.

For the purpose of stripping from the controversy conflicting proofs relating to extraneous facts and confusing principles of law foreign to the issues, I prefer to make my own statement of the case.

Plaintiff had been the wife of defendant and, in the court of chancery for Benton county, Arkansas, had procured a decree of divorce and alimony on a cross-bill filed by her in a divorce suit instituted by her husband. The Arkansas court granted the divorce March 2, 1911, allowing "\$5,111 in full of alimony and all other demands set forth in the cross-bill." From that judgment no appeal was taken. The petition in the present case was filed in the district

96 court for York county, Nebraska, November 24, 1911. It contains the plea that defendant owns in York county,

Nebraska, lands worth \$48,000, which the Arkansas court had no jurisdiction to, and did not, consider in awarding alimony. To the petition for additional alimony defendant demurred on the ground that the Arkansas decree is a bar to a further recovery and that plaintiff is defeated by estoppel, because she accepted and retained the fruits of the former adjudication. The trial court sustained the demurrer and from a dismissal of the action for additional alimony, plaintiff appealed to this court, where it was held the petition showed on its face that the Arkansas court had no jurisdiction to, and did not, consider defendant's York county lands in awarding alimony. The dismissal, consequently, was reversed and the cause remanded for further proceedings. *Bodie v. Bates*, 95 Neb. 757. A trial on the merits of the case resulted in a decree awarding plaintiff additional alimony in the sum of \$10,000. Defendant has appealed.

The question raised may be stated as follows: Under the facts pleaded and proved in the present case did the court of chancery of Benton county, Arkansas, have jurisdiction to consider the value of defendant's Nebraska lands in determining the amount of alimony

to which plaintiff was entitled? If this inquiry should be answered in the affirmative, the question now in controversy was adjudicated in the former action for divorce. In that suit both parties appeared before the court in person and by counsel, each asking for affirmative relief. Defendant's interest in the York county land was 97 there put in issue by the pleadings. Proof of its value was adduced at great length. Whether the Arkansas court, in determining the amount of plaintiff's alimony, had jurisdiction to consider defendant's Nebraska land in York county was a question argued at the trial of the action for a divorce.

It is the policy of the law to determine in one action litigable questions relating to divorce and alimony, unless the legislature has otherwise provided. Society's interest in proper domestic relations and the rights of parties to a suit for a divorce require a complete adjudication in a single action, where jurisdiction to sever marital relations and to adjust property rights exists. Owing to a controversy over the power of an Arkansas court to consider the value of Nebraska land in awarding alimony, the parties have been permitted to narrate in the courts of two states the unhappy and distressing incidents of their married life.

The former appeal presented the sufficiency of a petition alleging that the following provision of an Arkansas statute was the only law of that state authorizing the allowance of alimony to a wife in case of a divorce:

"Where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband 98 shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been released by her in legal form." Kirby's Digest of the Statutes (1904), sec. 2684.

After the case had been remanded to the district court, defendant pleaded and proved another Arkansas statute containing these words: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest of the Statutes (1904), sec. 2681.

This statute, authorizing divorce courts to award alimony according to the circumstances, uses general terms applying to all cases. It confers on the divorce courts of Arkansas the power of similar courts throughout the country. That act was passed long before the enactment invoked by the majority to narrow the jurisdiction of divorce courts. The earlier statute is in full force according to its original import, since it has not been changed, modified or amended in a manner authorized by the constitution of Arkansas. The statutes may be construed together without doing violence to the rules of

statutory construction. Both may be enforced. Under the earlier act reasonable alimony may be determined from the circumstances of the parties and the nature of the case. For that purpose, land outside of Arkansas may be considered. Inquiry into general equity

power of divorce courts of Arkansas is therefore immaterial.
99 By proper pleadings and proofs the facts relating to defendant's interest in the Nebraska lands were presented to the Arkansas court. If they were not in fact considered, plaintiff, had her remedy by appeal to the supreme court of that state. In any event the question now determined was formerly adjudicated, according to principles of law properly settled. There is no Arkansas precedent to the contrary.

In *Fischli v. Fischli*, 1 Black. (Ind.) 360, the report shows that plaintiff procured a divorce from her husband in Kentucky, where the statute provided that the wife should have a specific share of his property. Subsequently she brought an action in Indiana for additional alimony based on property owned by defendant in that state. A demurrer to the petition was sustained, the court saying:

"This divorce having been granted in Kentucky, and a part of the husband's property decreed to the wife, it is important for us to know how far the rights of the parties, with regard to the provisions made for the wife, were adjudicated and determined by the proceedings which were had in that state. For whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other

matter which the parties might have litigated in the case.
100 * * * Guided by this principle, we should naturally suppose that the decree of the circuit court in Kentucky had done all that equity and justice required between the parties, if there is nothing in the record of their proceedings to evince the contrary, nor anything in the case to limit their authority; and that the rights of the parties, being thus determined, were subject to no further litigation. The separate maintenance that should be decreed to the wife out of the husband's property, according to her condition in life, the fortune she brought, and her husband's circumstances, was the subject-matter of adjudication before the court that granted the divorce; and if that tribunal had the power to do ample justice between the parties, but has failed to do it, no other tribunal can take cognizance of the subject, and supply the deficiency." See, also, *McCormick v. McCormick*, 82 Kan. 31.

The decision of the majority that the general statutory power of the Arkansas divorce court to award the wife reasonable alimony, upon the granting of a divorce, applies alone to cases wherein the husband obtains the decree is not warranted by the language or intention of the lawmakers or by any construction of the supreme court of Arkansas. The earlier Arkansas statute was adopted in the Indian Territory.

In *Ecker v. Ecker*, 22 Okla. 873, it was argued that this section did

not authorize a court to grant alimony to a wife when the divorce was granted to the husband for her misconduct. The supreme court of Oklahoma said: "Under the language of this statute, or similar language of the statutes of other states, the courts have held 101 that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case."

Adams v. Adams, 30 Okla. 327, is to the same effect.

In the majority opinion, an estoppel not well pleaded or properly proved, is substituted for a technical plea of res judicata. The law on both subjects is confused in disregard of the following observation in Hanson v. Hanson, 64 Neb. 506

"Considerable obscurity may be avoided by keeping in mind the distinction between a judgment, urged as a technical bar to another action, and one that is urged as conclusive as to some one or more points tried and determined in a former action."

In affirming the judgment allowing plaintiff additional alimony in the sum of \$10,000, a technical plea of res judicata established by uncontradicted evidence has been disregarded without ending the litigation for alimony. The record shows that defendant has property in Oklahoma. If the decision is right, he may be pursued in that state for still further alimony and in other states where he may have additional property. The decision of the Arkansas court has been reviewed here. Full credit has not been given to the judgment of the court of another state. The decree for additional alimony should be reversed and the action dismissed.

Barnes and Letton, JJ., concur in this dissent.

102 And, on the 27th day of April, 1915, there was filed in the office of the clerk of the supreme court of Nebraska in said case, a certain Bill of Exceptions. The following is a true copy of pages 1 to 20, inclusive, of said Bill of Exceptions:

103 Mr. Davidson: We offer in evidence a certified copy of the pleadings and the decree in the Arkansas court, marked Exhibit "1."

Mr. Field: The defendant Edward Bates objects to the introduction of any testimony for the reason that the petition fails to state a cause of action in favor of the plaintiff and against the said defendant, Edward Bates, and for the further reason that the district court of York county has no jurisdiction to hear, try and determine this action; for the further reason that neither party has resided in the state of Nebraska a sufficient time to give the court of York county jurisdiction to try, hear and determine this action;

For the further reason that the plaintiff, nor the defendant reside in the county of York, and for that reason the court is without jurisdiction, and for the further reason that the evidence offered is incompetent, irrelevant and immaterial.

The Court: In that last objection, Judge Field is the question of foundation raised?

Mr. Field: Why, I think not, Judge, but I am not waiving anything on that question.

The Court: The objection will be overruled.

Exhibit 1 received and read in evidence as follows:

104 STATE OF ARKANSAS,
Benton County, ss:

Pleas Before the Court of Chancery in and for Benton County, in the State of Arkansas, Hon. T. H. Humphreys, Chancellor, Present and Presiding.

Be it remembered that heretofore, to-wit: on the 14th day of June, 1910, Edward Bates, Plaintiff, filed an original complaint in the office of the Clerk of the said Court against Lucie Bates, defendant, in the words and figures following, to-wit:

1.

Comes now the above named plaintiff and for his cause of action against the defendant and states that he was legally inter-married to the defendant in the year 1900 and that said marriage relation still continues to exist.

The plaintiff has resided in this state for more than one year next before the commencement of this action and that the cause of divorce occurred in this state and within five years next before the commencement of the suit.

That the defendant is guilty of such cruel and barbarous treatment toward the plaintiff and offers such indignities to the person of the plaintiff as to render his condition intolerable.

Wherefore the premises being proven plaintiff prays judgment for a decree of absolute divorce from the defendant.

EDWARD BATES.

Filed June 14, 1910. W. T. Maxwell, Clerk and Recorder.

Afterwards on the 29th day of June 1910, the said defendant Lucie Bates, filed in the office of the Clerk of the said Court an answer and cross complaint in said suit in the words and figures following, to-wit:

105

2.

Comes the defendant, Lucie Bates, and for her defense and answer to plaintiff's complaint herein denies that she is guilty of inflicting upon the plaintiff indignities, and she denies that by her treatment and conduct of the plaintiff she has rendered his life unbearable but, on the contrary she charges the facts to be her treatment and conduct of the plaintiff has uniformly been of a kind, considerate and respectful character—and for further defense and by way of demurrer to plaintiff's complaint, the defendant states said complaint does not set forth facts sufficient to constitute a cause of action against her.

Wherefore, the premises being considered, the defendant prays that plaintiff's bill be dismissed for want of equity.

And further defense and by way of cross complaint against the plaintiff, defendant makes the following averments:

That she is now and has been continuously since June, 1906 a resident of Benton County, Arkansas. That defendant and plaintiff were lawfully inter-married in the State of Nebraska in the year 1889, since which time plaintiff and defendant lived together as husband and wife until about the 7th day of June, 1910, when the defendant and cross-complain-t was by reason of plaintiff's cruel and brutal treatment compelled to leave home. She states and charges that the plaintiff is much addicted to the excessive use of alcoholic liquors and when under the influence of liquor the plaintiff, by his conduct and language toward the defendant manifested great disrespect and disregard for the feelings and well being of the defendant and does not hesitate to and does employ language and epithets, names and appellations toward and about the defendant without reason or excuse and for no other purpose than to wound her feelings and humiliate her and to show his utter disregard and supreme contempt for her.

106 The said Lucy Bates further states and shows that the said Edward Bates for a long time before their separation habitually and without any foundation in fact or truth, accused and charged her with being — infidelity with one George W. Thurman and of being an impure and unfaithful woman and wife, she shows that when she would entreat him to desist in his false and slanderous charges, he would scoff and sneer at her and order her to leave his home and go her way. She further states that the plaintiff Edward Bates, on the 7th day of June 1910, practically forced her by his conduct and slanders to flee her home for protection and she is informed and believes that since that time hired sleuths have hounded after her in the hope of discovering or manufacturing evidence detrimental to her good name.

Said Lucy Bates states she has — all times conducted herself as a good, pure and faithful wife and has at no time given the plaintiff any grounds or reason to suspect her purity or to challenge her chastity, and that by reason of his persistent and repeated false accusations her life has been unbearable.

The said Lucy Bates further shows that the said Edward Bates is the owner of real and personal property of the reasonable and fair value of \$75,000.00 consisting of 320 acres of land in York Co. Neb. described as follows, to-wit: the S. W. $\frac{1}{4}$ in section 7-8 also town lots in Custer, Oklahoma; and she further shows that about the year 1902 she became the owner in her own and separate right of \$3,000.00 in money and shortly after she loaned \$2,500.00 of the same to her said husband, taking his notes therefor bearing interest at the rate of 8% per annum.

The premises being considered the said cross-complain-t prays that the bonds of matrimony heretofore entered into between herself and the said Edward Bates be dissolved and that he be required to restore

107 to her said sum of \$2,500.00 so borrowed from her and 8% interest thereon since July 1st 1902, and that the court award her such alimony as the facts and law warrant, and all to her proper or necessary relief.

LUCIE BATES,
Defendant,
 By J. A. RICE AND
 D. C. SHANNON,
Attorneys for Defendant.

Filed June 29, 1910. W. T. Maxwell.

Afterwards on the 14th day of July 1910, there was filed in said court an amended complaint in said cause in the words and figures following, to-wit:

3.

To the Honorable T. H. Humphreys, Chancellor:

The plaintiff for his cause of action against the defendant states: That he and the defendant were legally married in the year 1889 in the State of Nebraska; that they lived together as husband and wife most of the time since their marriage up until recently; that plaintiff is a resident citizen of Benton County Arkansas, and has been for more than twelve months next before the filing of his original complaint in the action, which was filed on the 14th day of June 1910; and that his cause for action and grounds for divorce hereinafter alleged, occurred and existed within the State of Arkansas within five years next before the commencement of his original suit herein.

Plaintiff states that he has at all times conducted himself toward the defendant as a faithful affectionate husband; that he has been true to his marriage vows, and has given defendant no cause for the many indignities and misconducts which she has heaped upon him, and which are hereinafter set forth.

That the defendant unmindful of her marriageable obligations has been guilty of such cruel and barbarous treatment of the plaintiff and has offered such indignities to the person of the plaintiff as to rendered his condition intolerable.

108 Plaintiff states that he had only known defendant for about six months at the date of their marriage; that as hereinafter stated, they were married in 1889, and that in the year 1900 the defendant became a Christian Scientist and adopted the teachings and beliefs of Mrs. Mary Baker G. Eddy, much against the advice and protestations of this plaintiff.

That she neglected her duties to the plaintiff, neglected her home life, and that in April 1901 her conduct toward the plaintiff and her treatment of him became so unbearable that they separated, the plaintiff leaving her in possession of his home at York, Nebraska, leaving her in a well furnished house, provided for her every want, and the plaintiff left the state of Nebraska and went to Caddo, Ind. Ter. where he engaged in the implement business. That during all of his

absence from her, which was about one year, he furnished her ample means to properly support her in the station of life in which she as his wife was entitled to live. That the cause for the first separation of the plaintiff and the defendant was incapability of temper, that she was peevish and fretful and quarrelsome; that she paid more attention to Christian Science than she did to her duties as a wife; that he was informed that she was too familiar with other men, notably with a Doctor by the name of Shadler, who resided at York, Nebraska; that the said Doctor Shadler was a younger man than the plaintiff herein; that she seemed to and did prefer his society than the society of her husband, and disregarding the objections of the plaintiff to her receiving attentions from Doctor Shadler.

That afterward, to-wit, in the year 1902, plaintiff and defendant patched up their difference, and upon her coming to Caddo, Ind. Ter. they resumed their marital relations and lived happily together for the space of about one week, at which time defendant again manifested to a great degree her ungovernable temper, that she 109 was peevish, fretful, quarrelsome and nagging and made life absolutely unbearable to plaintiff.

That regardless of the plaintiff's entreaties to her, she pursued her inclination for Christian Science, and spent most of her time, in fact nearly all of it, in her attentions to Christian Science and its teachings, so much so that in 1904 her mind became unbalanced and it became necessary to place her in a Sanitarium for the treatment of nervous diseases and insanity, that this plaintiff kept her in Punton's Sanitarium in Kansas City, Missouri, during the years of 1904 and 1905, Doctor John Purton being the physician in charge and that this plaintiff cheerfully and willingly paid all the expenses of her treatment, amounting to about \$4,000.00. That after her release from said Sanitarium, that she and the plaintiff resumed their marital relations and continued to live together as husband and wife until about fifteen months next preceding the commencement of the original action in this case. That at that time and forever thereafter defendant refused to cohabit with the plaintiff as his wife, that she was guilty of studied neglect, rudeness and mistreatment of the plaintiff; that she was abusive to him in that she would frequently call him vile names, would call him a vile old man, "an old puppy," and stated to him frequently, "I hate you." "I hate you." That she threw slops in his face from a dish pan, and that her course of conduct to him was such as to make his life utterly miserable.

That the defendant brought her mother to live in plaintiff's home, and that it was a pleasant duty for the plaintiff to provide for her welfare and for her comfort; that while her mother was in plaintiff's home, it became apparent that her physical condition was such that she needed the attention of skilled physicians, and that this plaintiff employed Dr. J. W. Webster and Dr. Clegg, of Siloam

110 Springs, men eminent in their profession, to treat the mother of defendant; that he was informed by said physicians that defendant's mother was suffering from an incurable malady, consumption of the stomach, and that all medical science could do

was to alleviate her pain,—and make her declining days as comfortable as possible; that over the objection of plaintiff, the defendant disregarded the treatment and advice of Dr. Webster and Dr. Clegg and sent to Kansas City for a Christian Science Healer to wait upon her mother, and the mother died within two days after the arrival of said Healer.

Plaintiff alleges that the defendant herein claims to be somewhat of a Healer herself, that she treated one Mrs. Swaggerty for cancer by the Christian Science route, and also claims to have cured one George Thurman of Rheumatism, by the same treatment, much to the disgust and annoyance of the plaintiff.

Plaintiff states that for some time before the commencement of this suit, he has been a sufferer from Neuralgia of the stomach, and from gall stones, that his physicians, Drs. Webster and Clegg, prescribed medicine for his treatment, that at times the plaintiff became utterly helpless, that the defendant refused to administer to him the medicine prescribed by Drs. Webster and Clegg, insisting that and telling him "You have no neuralgia of the stomach! You are not troubled with gall stones! You just think you are! You are well!" and refused absolutely to administer to him the medicine prescribed by his physicians when this plaintiff was unable to administer to himself.

And plaintiff states that for a number of years last past this treatment of him has been one continuous course of studied neglect, of open abuse, vilification of him, of refusal upon her part to perform wifely duties, and that his condition in life has been rendered absolutely intolerable by her treatment.

111 Plaintiff states that he is a man advanced in years, being now 64 years of age; that he has raised a family by his first wife, who are all adults, that there has been no issue by marriage with the defendant herein.

The premises considered, plaintiff prays that the bonds of matrimony so entered into by and between plaintiff and defendant be annulled, set aside and held for naught, that he be granted an absolute divorce from the defendant, and that he be restored to all the rights and privileges of a single and unmarried person. And will ever pray.

EDWARD BATES,
By R. F. FORREST AND
WALKER AND WALKER,
His Solicitors.

Filed July 14, 1910. W. T. Maxwell, Clerk and Recorder.

Afterwards on the same day there was filed in said court by defendant, Lucie Bates, an answer to said amended complaint in the words and figures following, to-wit:

4.

Defendant's Answer to the Plaintiff's Amended Complaint.

To the Chancery Court of Benton County:

The defendant, Lucie Bates, for her answer to the plaintiff's amended complaint herein, states, and shows as follows:

She admits the marriage of plaintiff and defendant at the time and place alleged in the complaint, and that they lived together as husband and wife most of the time since their marriage until a short time before the filing of the original complaint herein; but,

Denies that the cause of action for Divorce alleged in the Plaintiff's complaint occurred and existed in the State of Arkansas, and within five years before the filing of the plaintiff's original complaint herein, or at any other place or time.

For further defense the defendant denies that the plaintiff at all times or even most of the time conducted himself toward the defendant as a faithful and affectionate husband.

112 Further answering the defendant says that she has not sufficient accurate information as to the truth of the plaintiff's allegations that he had, at all times, been true to his marriage vows, upon which to form a belief or to predicate either the admission or denial of the allegation and asks that the plaintiff be held to strict proof of the truth of said allegations.

Further answering, she denies that she has, at any time, heaped upon the plaintiff indignities or otherwise mistreated him, as alleged in his amended complaint; and,

For further answer and defense herein, this defendant positively and emphatically denies that she has at any time or place been unmindful of her marriage obligation or that she has been guilty of cruel or barbarous treatment of the plaintiff or that she has ever offered or been the occasion or cause or excuse that would render the plaintiff's condition in life intolerable; and she denies that she has at any time or place neglected the performance of every reasonable duty and obligation due from her to the plaintiff; or that she has neglected her home life because of her views on the subject of Christian Science or that she has by reason of such views, neglected the plaintiff or mistreated him in any manner whatever, or that she and the plaintiff became separated, as alleged in the complaint, by reason thereof; but,

States and charges the facts to be that said separation was caused and brought about by the intemperate habits and the excessive indulgence in a-chololic liquors upon the part of the plaintiff together with a mania or mental malady, known in recent years as wanderlust; and

Further answering she denies that she was peevish, fretful or quarrelsome during the time the plaintiff and defendant lived together as husband and wife; or that she devoted more attention to Christian Science than she did to her duties as a wife; and,

113 For further answer and defense herein, this defendant most positively denies that she, at any time or place, was either unduly or improperly familiar with any other man or men—and especially with one Dr. Saddler of York, Nebraska; and,

She states and charges the facts to be, that the plaintiff was not so informed that she was as he alleges in his complaint; and she charges his allegation is false insinuation based upon what he calls information; and that such insinuation is unfair to her and without any merits or truth whatever; and is only a sample of the wicked or sinister methods resorted to by the Plaintiff during a great portion of their married life to nag and annoy and render the defendant unhappy.

The defendant admits that after said separation, and after the plaintiff had wandered about over the country until he became weary of doing so, he returned to her and assumed the relation of husband and wife which continued until the plaintiff became impressed that it was his paramount duty and purpose of life to return and to continue to worship at the shrine of Bacchus; and while in this frame of mind he was peevish and unreasonable, disagreeable and intolerable in his temper and habits, during which time this defendant did all that was in her power to make life with him tolerable; and,

For further answer and defense herein, the defendant states that it is not true as alleged in the complaint that her devotion to Christian Science unbalanced her mind or that her tenets and views and practices on the subject of Christian Science contributed in any way toward unbalancing her mind; but,

She stated and charges the facts to be that if her mind became unbalanced it was by reason of the treatment received by her at the hands of the plaintiff, producing nervous trouble and prostration, and for which condition he alone was responsible; and that if plaintiff kept defendant in the Punton Sanitarium, as alleged in his complaint, it was rendered necessary because he had not been previously assigned to Pluto's Dungeon.

114 Further answering she denies that she has, at any time, been guilty of any neglect, rudeness and mistreatment of the plaintiff alleged in the complaint or that she would frequently call him vile names or that she would throw slop in his face from the dishpan mentioned in his complaint.

This defendant further states that she makes no answer to the plaintiff's allegation as to how he treated her mother or why he did so, for the reason that that matter is not involved in this suit; and,

She further states that the plaintiff has not set forth in his complaint wherein he would be injured by the defendant treating a fellow being for cancer or other maladies by the Christian Science route or by any other route; and,

For further answer and defense herein, she denies that at any time during the plaintiff's illness while residing with her and when he was drunk or sober, has she refused to administer and care for him as she was duty bound to do, and to give him medicine according to his physicians' orders.

This defendant having fully answered, she asks that the plaintiff's bill be dismissed for want of equity, and that she have judgment for costs herein.

J. A. RICE AND
DEE SHANNON,
Attorneys for Defendant.

STATE OF ARKANSAS,
County of Benton, ss:

Affidavit.

I, Lucie Bates, do solemnly swear that I am the defendant in the above and foregoing cause, and that the foregoing is my answer to Plaintiff's Amended Complaint, and that the statements herein contained are true and correct to the best of — knowledge and belief, so help me God.

LUCIE BATES, *Defendant.*

Subscribed and sworn to before me this 4th day of August, 1910.
 [L. s.]

J. A. PETTY,
Notary Public.

My commission expires Nov. 12, 1912.

115 And also at the same time there was filed in said court by the plaintiff Edward Bates an answer to defendants cross complaint, in the words and figures following, to-wit:—

In the Benton Chancery Court, July Term, 1910.—5.

EDWARD BATES, Plaintiff,

vs.

LUCIE BATES, Defendant.

Answer to Defendant's Cross Bill.

Comes this plaintiff and denies each and every allegation made by defendant in her cross bill not hereinafter expressly admitted, and for answer says:

That it is true that the defendant is a resident of Benton county, Arkansas, and has been since 1906; that it is true that she and the plaintiff were legally married in the State of Nebraska in the year 1889, but that it is not true that they have lived together since said date until the 7th of June, 1910; but that heretofore they separated in the month of April, 1901; and remained apart for the space of about one year.

That it is not true that this plaintiff was cruel and brutal in his treatment of the defendant, or that he compelled her to leave her home, and he denies said allegation.

That it is not true that plaintiff is much addicted to the excessive use of alcoholic liquors, and when under the influence of liquors by his conduct and language toward the defendant manifest or has manifested great disrespect and disregard for her feelings and well being, or that he does not hesitate to and does imply language, epithets, names and appellations toward and about the defendant without and for no other purpose than to wound her feelings and to humiliate her, and to show his utter disregard and supreme contempt for her, or otherwise, and he denies said allegations.

And by way of answer to the allegation in the cross bill of the said Lucie Bates that the plaintiff has habitually and without foundation and fact, or in truth, accused and charged her with 116 infidelity and adultery and of being impure as a wife, the said Edward Bates states:

That the conduct and actions of said wife with other men has been such as to arouse his suspicions, and that he has frequently remonstrated with her and begged her to desist and refrain from such conduct, but the said Edward Bates states that he has no positive proof of infidelity and adultery on behalf of his said wife, and has frequently told her so, but to say the least of it, her conduct with other men has been very indiscreet and he has so informed her.

And the said Edward Bates further answering says:

That it is not true on the 7th day of June, 1910, he practically forced the said Lucie Bates by his temper and slanders and otherwise to flee from her home for her protection; that it is not true that he has hired sleuths to hound after her in the hope of discovering and manufacturing evidence detrimental to her good name, and he denies such charge.

That it is not true that the said Lucie Bates has at all times conducted herself as a good, pure and faithful wife, and he denies said allegation.

That it is not true that the said Lucie Bates has at no time given plaintiff any ground or reason to suspect her purity or to challenge her chastity, and he denies said allegation.

That it is not true by any act or conduct of the said Edward Bates that he has made the life of said Lucie Bates intolerable, and that the said Edward Bates further answering the cross bill of the said Lucie Bates, states:

That it is not true as alleged by the said Lucie Bates that he has been blessed in the accumulations of the goods of this world in the sum of \$75,000.00, but he states to the court that by industry and economy, he has accumulated the following property:—
117 320 acres of land in the state of Nebraska, one-half of which he now owns, the other half being held in trust for Alberta, Clem E., and Josephine, of the probable value of \$50.00 per acre; that he owns no lots in Custer, Okla., but that he owns property at Caddo, Okla., of the value of \$300.00; that he owns property and real estate at Siloam Springs, Arkansas, of the value of \$2500.00; personal property in Benton county, exclusive of household goods of the value of \$1,000.00; moneys, securities, script and other personal property of the value of perhaps \$6,000.00.

In answer to plaintiff's allegation that in the year 1902 she became the owner of her own separate right of the sum of \$3,000.00 the said Edward Bates states that upon the first separation from the said Lucie Bates, he gave her money in the sum of three thousand dollars, and that when they patched up their difference and again resumed the relation of husband and wife, that she returned \$2500.00 of the same to him, and that since that time he has used the same in his business; that never at any time did the said Edward Bates

come into possession of any money or property acquired by the said Lucie Bates from any other than from himself.

And the said Edward Bates further states that recently, the said Lucie Bates came into possession of a large amount of money and property, as the said Edward Bates is informed, in the sum of about \$3,000.00 from the estate of her mother, who is now dead, and the said Edward Bates charges and alleges that the said Lucie Bates is amply financially to conduct her defense to the action filed by the said Edward Bates herein, and to conduct the prosecution of the cross bill filed by her herein, without drawing upon the estate of the said Edward Bates for that purpose.

Therefore, he asks that her prayer for alimony, and for suit money and attorney's fees pendente lite be denied, and prays that upon the final hearing of this case, that the cross bill of 118 the said Lucie Bates be dismissed for want of equity, and that she take nothing by name of the same and that the said Edward Bates have the relief prayed in his amended complaint filed in this cause. And will ever pray.

EDWARD BATES.—
WALKER & WALKER.

Filed July 14, 1910, W. T. Maxwell, Circuit Clerk and Recorder.

Afterwards on the 2nd day of March, 1911, a day of the January term, 1911, of said Chancery Court, said cause was duly tried and heard by said court and after the introduction of the evidence and the argument of counsel upon the part of each party to said cause, a decree was entered therein in the words and figures following, to-wit:—

In the Benton County Chancery Court.

EDWARD BATES, Plaintiff,
vs.
LUCIE BATES, Defendant.

On this day this cause came on to be heard upon the complaint of the plaintiff, the answer and cross-bill of the defendant and plaintiff's answer to said cross-bill and documentary and oral proof adduced and said depositions taken in the cause.

And the court after hearing same and being well advised in the premises doth dismiss plaintiff's bill for want of equity and doth grant a divorce on the cross bill of the defendant herein.

It is ordered, adjudged and decreed by the court that the defendant Lucie Bates have and recover of and from the defendant Edward Bates the sum of \$5,111.00 in full of alimony and all other demands set forth in cross-bill which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree herein rendered.

119 It is further ordered, adjudged and decreed by the court that the defendant Lucie Bates have the following personal

property now in the residence of Edward Bates, at Siloam Springs Arkansas:—That is to say,—such silverware as has been purchased since the marriage of plaintiff and defendant. One side-board and china cabinet; one chiffon-er; one mat-ress; one-half of the quilts and comforts; one leather rocker; one wicker rocker; two birds eye maple chairs, one water tankard and such china as is her separate property.

It is further ordered and decreed by the court that a lien be declared on the following real estate in Benton county, Arkansas owned by plaintiff to secure payment of said judgment; Lot No. 9, Block No. 8, Beauchamp's Addition to the city of Siloam Springs, Benton county, Arkansas. And the defendant place with the clerk of this court the following notes and mortgages herein above referred to; and as additional security that the plaintiff place with the clerk of this court four notes of \$280.00 each, or a total of \$1120.00; one note for \$89.60. One note for \$112.00 the same having been given by one Shockey to Edward Bates. One note for \$500.00 and two notes for \$40.00 given by Ida and W. S. Tibbs to Edward Bates. One note for \$400.00 given by Richard O. Forman to Edward Bates; One note for \$500.00 given by Norris and Yonkers, being a total of \$2801.06 which are by the said Edward Bates, in open court deposited with the said clerk, all of which notes are secured by mortgages.

It is understood and agreed that the said Edward Bates may sell and dispose of any and all of said property, including real estate and notes, but upon the sale of the same he is to deposit the proceeds arising from said sales with the clerk of this court until he had paid the sum of \$5,111.00, together with 6% interest on 120 the same up to the time of such payment.

It is further ordered and adjudged by the court that no execution issue on this judgment for six months from this date and that such judgment bear interest at the rate of 6% per annum from date until paid.

It is further ordered by the court that both plaintiff and defendant may withdraw all exhibits filed in said cause, and the plaintiff may withdraw the testimony given by him and taken in short hand by W. F. Conine, Notary Public.

The court finds from the evidence that the defendant's maiden name was Lucie Bodie and it is ordered and adjudged by the court that she be restored to her maiden name.

It is further ordered and adjudged by the court that plaintiff pay all costs in this suit laid out and expended.

It is further ordered and adjudged by the court that the bonds of matrimony entered into by and between plaintiff and defendant be dissolved, set aside and held for naught.

STATE OF ARKANSAS,
Benton County, ss:

I, W. M. Heaslet, clerk of the court of Chancery in and for said county, do hereby certify that the above and foregoing is a true

and correct transcript and exemplification of the original complaint, the answer and cross-complaint; the amended complaint; the answer to the amended complaint; the answer to the cross-complaint, and the decree entered in said court, in the cause then therein pending wherein Edward Bates was Complainant, and Lucie Bates was defendant, as the same appears on filed and of record in my office.

In testimony whereof I have hereto set my hand and the seal of said court, this 12 day of June, 1914.

[SEAL.]

W. M. HEASLET, Clerk.

121 STATE OF ARKANSAS,
Benton County, ss:

I, T. H. Humphrey, Judge of the Court of Chancery in and for said county, hereby certify that W. M. Heaslet, whose name is signed to the foregoing certificate, is the clerk of said court, that his signature attached to said certificate is the genuine signature of said clerk, and his certificate and attestation to the foregoing exemplification from the records of said court, is in due form of law in said state, and said exemplification from said records is entitled to full faith and credit, wheresoever exhibited.

Witness my hand this 13th day of June, 1914.

[SEAL.]

T. H. HUMPHREYS, Judge

STATE OF ARKANSAS,
Benton County, ss:

I, W. M. Heaslet, Clerk of the Court of Chancery in and for said county hereby further certify that Hon. T. H. Humphreys whose name is signed to the foregoing certificate, is the presiding judge of said court, and the signature attached to said certificate is the genuine signature of said Hon. T. H. Humphreys.

Witness my hand and the seal of said court this 15 day of ——, 1914.

[SEAL.]

W. M. HEASLET, Clerk.

122 Mr. Davidson: We will now offer the testimony that we have here as to the value of that land. We first offer the deposition of George W. Post.

Mr. Field: To which the defendant objects as incompetent, irrelevant and immaterial.

Mr. Davidson. First we will offer in evidence Exhibit "2" being a stipulation.

Mr. Field: Defendant objects to the stipulation as incompetent, irrelevant and immaterial, but it is admitted that it is a stipulation signed by the parties.

Objected overruled. Exception.

Exhibit "2" received and read in evidence as follows:

STATE OF ARKANSQS,
County of Benton:

LUCIE BODIE, Plaintiff,
vs.

EDWARD BATES, Defendant; CLEMENT E. BATES, ELBERTA BATES
AND JOSEPHINE BATES, Intervenors.

It is stipulated and agreed that the depositions of the witnesses mentioned by W. M. Heaslet, Chancery Clerk of Benton County, Arkansas, in his deposition given in this cause as contained in the depositions marked by the stenographer as Exhibits "A", "B", "C", "D" and "E" to the deposition of W. M. Heaslet were read to the Chancellor at the trial of the case of Edward Bates against Lucie Bates, and that they constitute all the evidence heard on the trial of said cause, except the testimony of Edward Bates and Lucie Bates, which was given orally in open court, and the exhibits thereto, which were by the Chancellor permitted to be withdrawn after the decree was rendered in this cause.

S. P. DAVIDSON, *Attorney for Plaintiff.*
FIELD, RICKETTS & RICKETTS,

Attorneys for Defendant.

J. WYTHE WALKER,
Attorney for Intervenors.

123 Mr. Davidson: It is stipulated that the deposition of George W. Post, Harris M. Childs, S. A. Myers, M. C. Frank, Charles F. Stroman, C. H. Kolling, W. W. Wyckoff, and W. H. Brott, were introduced on the trial of the case of Edward Bates against Lucie Bates in the Chancery court of Benton county, Arkansas,—said cause was tried the first and second days of March, 1911, in regard to the value of the property, viz; the southwest quarter of Section Eight, the South half of the Northwest quarter of Section Eight, and the East half of the Southeast quarter of Section Seven, all in Township Ten, Range Two, in York county Nebraska, alleged to belong to Edward Bates, located in York county, Nebraska, and also the depositions offered by the plaintiff in that case in regard to the value of said lands, to wit: W. B. Malcolm, Charles F. Baughan, C. A. Wildman, W. L. Kirkpatrick, Douglass Wendell, M. C. Frank and M. Meeker; that the testimony of all of said witnesses so taken may be read in evidence on the trial of this cause and have the same force and effect as though they were taken directly in this case, subject only to objection for incompetency and irrelevancy.

Mr. Davidson: We now offer the deposition of George W. Post.

Mr. Field: To which the defendant objects as irrelevant and immaterial.

Objection overruled. Exception.

124 And on the 1st day of March, 1916, there was filed in the office of the clerk of the supreme court of Nebraska in said case, a certain Stipulation concerning the testimony contained

in the bill of exceptions theretofore filed in said case, and which stipulation provides that certain of said Testimony shall be included in the return of the clerk of the supreme court of Nebraska to the writ of error issued on the appeal of Edward Bates herein to the supreme court of the United States. The following is a true copy of the said stipulation and of the evidence covered by said stipulation.

125 **GEORGE W. POST:** Have resided in York, York county, Nebraska 35 years. Am President of the First National Bank. Have bought and sold lands in York county and know their value. Am well acquainted with the Southwest Quarter (S. W. $\frac{1}{4}$) and the south half of Northwest Quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$ of section eight (8); and east half (E. $\frac{1}{2}$) of Southeast Quarter (S. E. $\frac{1}{4}$) of section seven (7), all in town ten (10) north of Range two (2), west, in York county, Nebraska and known as Edward Bates' farm. It lies about a mile and a half south of the corporate limits of the city of York. I think it is worth \$41,145. Its rental value is about \$3.50 per acre.

HARRIS M. CHILDS: Am 51 years of age. Have resided in York, York county, Nebraska for more than 12 years. Am president of the City National Bank. Am familiar with land generally in York county and know its value. Know the Bates' land near the corporate limits of York, York county, Nebraska and know its market value. In my opinion it is worth \$135 per acre.

S. A. MYERS: I am 60 years old. Lived in York county 36 years. Farmed most of that time. I am acquainted with the value of real estate in York county, Nebraska. Know the Bates' land lying near the corporate limits of the city of York, York county, Nebraska. It is worth about \$125 per acre. Ought to rent from \$3.50 to \$4.00 per acre.

126 **CHARLES F. STROMAN:** I am 39 years old. Have lived in York, York county, Nebraska about 13 years. I am a lawyer by profession. I am acquainted with the value of lands in York county, Nebraska. Know the Bates' land lying near York and its value. It is worth about \$125 per acre. Has a rental value of about \$3.50 to \$4.00 per acre.

C. H. KOLLING: I am 42 years old. Have resided in York, York county, Nebraska since 1880. Know the value of lands in York county, Nebraska. I am acquainted with the Bates' land near the corporate limits of York and know its value. In my opinion it is worth \$130 per acre. Has a rental income of from \$3.00 to \$4.50 per acre.

W. W. WYCKOFF: I have resided in York about 30 years. Know the Bates' land lying near the city of York and its value. In my

opinion it is worth about \$125 per acre and has a rental value of approximately \$3.50 to \$4.00 per acre.

H. W. BROTT: I am 49 years old. I have resided in York for 24 years. I am acquainted with the Bates' land lying near York and its value. It is worth about \$125 per acre; with a long-time lease it ought to have a rental value of \$1,200 to \$1,500 a year.

M. C. FRANK: I have lived in York since '79. Know the Bates' land lying near the city of York and its value. Consider it worth about \$140 per acre. On a time lease it ought to have a rental value of \$3.50 to \$4.00 per acre.

127 W. M. HEASLETT: I am 36 years old. Reside at Bentonville, Arkansas. I am Chancery Clerk in Benton county, Arkansas and was in March, 1911. Was present in court at the time of the trial of the divorce suit between Bodie and Bates. Heard the court announce its decision.

During the trial more or less was said about property Bates owned in Nebraska and the Court refused to take that matter into consideration, as he seemed to think he had no jurisdiction of the property. My recollection is that the court refused to take the Nebraska land into consideration in determining the amount of alimony he awarded to Bodie. My recollection is there was some claim by Bodie of the right to recover for borrowed money. I could not testify what the court's decision was in that regard; it is not definite in my mind.

Cross-examination:

Bates' counsel prepared the original draft of the decree. The depositions of Post, Childs, Myers, Strohman, Kolling, Wyekoff, Brock and Frank taken by Bodie in York county, Nebraska with reference to the value and rental income of Bates' Nebraska land were filed in my office and read in evidence on the trial.

Also the depositions of the following witnesses taken by Bates in York, York county, Nebraska, were filed in my office and read in evidence in the divorce suit: Kirkpatrick, Malcolm, Wildman, Baughan and Wendell.

The depositions of other witnesses on other subjects were also taken and read in evidence on the trial of the divorce suit.

The opinion of the court at the conclusion of the divorce trial was rendered orally from the bench. I think he went into every phase of the case. I don't think the court took the land outside of Benton county into consideration. I know what the court said and I have stated my recollection of it. It is my recollection that the rental value of the Nebraska land and what it had produced for several years was put in evidence. I remember that the Chancellor announced that while he did not have jurisdiction over the lands in Nebraska, he did have jurisdiction over the person of Bates, as he was personally present in court. The court required Bates to deposit security for the payment of the alimony awarded.

The alimony was paid into my office before the time expired and I paid it to the counsel for Bodie. There was no appeal taken from the decree. As I recollect it the decree rendered was on the consent of Bates on condition that Bodie would not appeal.

F. G. LINDSEY: I am 52 years old. Reside at Bentonville, Arkansas. Am a lawyer.

Kirby's Digest contains the statutes of Arkansas. Section 2684 of Kirby's Digest relating to Divorce and Alimony was passed March 28, 1893 and reads as follows:

"Sec. 2684. In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and when the divorce is granted to the wife, the court, shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce

against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled (n); and when it appears from the evidence in the case, to the satisfaction of the court, that such real estate is not susceptible of the division herein provided for without great prejudice to the parties interested, the court shall order a sale of said real estate to be made by a commissioner to be appointed by the court for that purpose, at public auction to the highest bidder upon the terms and conditions, and at the time and place fixed by the court; and the proceeds of every such sale after deducting the cost and expenses of the same including the fee allowed said commissioner by said court for his services, shall be paid into said court and by the court divided among the parties in proportion to their respective rights in the premises. The proceedings for enforcing these orders may be by petition of either party specifying the property the other has failed to restore or deliver, upon which the court may proceed to hear and determine the same in a summary manner after ten days' notice to the opposite party. And such order, judgment or decree shall be a bar to all claim or dower in and to any of the lands or personality of the husband then owned or thereafter acquired on the part of his said wife divorced by the decree of the court."

I participated as one of Bodie's counsel in the divorce trial between Bodie and Bates in Benton county, Arkansas, in March, 1911. I was present during the entire trial. I have some recollection as to

the holdings of the court. The court stated that Bodie was entitled to recover \$2,500 claimed as borrowed money; that he had 130 notes and mortgages to the amount of \$6,000 or \$7,000 and his home in Siloam Springs of the value of \$2,500; and he arrived at the conclusion, as I understood it, that from this property she was entitled to the aggregate amount awarded.

Bodie's counsel urged the court that he had a right to take into consideration Bates' Nebraska lands, but the court held that it had no jurisdiction of the real estate in another state; that he could not determine the question of real estate in Nebraska because the evidence disclosed "that the children of Judge Bates held a deed to a portion of that property in Nebraska and they were not parties to the suit." He said he did not have jurisdiction to take the land into consideration or its value. As I understand it, the court in fixing the alimony took into consideration the present worth of 1/3 of \$7,000 and the residence in Siloam Springs, Arkansas. Bodie's counsel argued that the court had jurisdiction of the Nebraska land, and Bates' counsel argued that it had not. My memory says that the court figured on Bates' personal property here and that he has no jurisdiction to take into consideration the Nebraska land, because Bates' children had a deed to that and they were not parties to the suit.

Cross-examination :

I am acquainted with Kirby's Digest of the Arkansas statutes. Section 2681 was passed and approved Dec. 18, 1837 and reads as follows:

"When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable."

131 The depositions taken in York county, Nebraska as to the value of Bates' Nebraska land were read in evidence in the divorce trial. Walker wrote the decree, and he and McGill and Davidson, representing Bodie, went over the draft together. My understanding is that the court agreed to the draft prepared. The Chancery Court having had jurisdiction of the person of Bates I was of the opinion then and am now that it is the law of the State of Arkansas that it could enforce any order made against Bates or any other litigant touching alimony.

D. C. SHANNON: I am 47 years of age. A practicing attorney in Benton county, Arkansas. I participated as one of the attorneys for Bodie in the divorce trial in Benton county, Arkansas and was present during the entire trial. It was my understanding that the court allowed Mrs. Bates \$2,500 as money borrowed by Bates, as part of the \$5,111.

There was a controversy by respective counsel whether the court had jurisdiction to consider Bates' York county land, and as I understood the court he held that he could not consider the Nebraska land, but that Bodie was entitled to recover \$2,500 as borrowed money,

1/3 interest in the home in Siloam Springs (the value of which was estimated at \$2,500). Expectancy tables were used to determine the expectancy of Bodie. I naturally concluded that the court had excluded from consideration Bates' interest in the Nebraska land from the sum allowed. The court stated that \$2,500 was borrowed money, 1/3 interest in about \$7,000 personal property and a lifetime expectancy in the home in Siloam Springs. These amounts totaled about \$5,111.

132 Cross-examination:

The Chancellor called for the life expectancy tables to ascertain the expectancy of Bodie and they were submitted to the court. Depositions as to the value of Bates' York county land were offered and read in evidence by both sides in the divorce suit.

L. H. MCGILL: I am 60 years old; reside at Bentonville; a lawyer by profession. I was one of Bodie's counsel in the divorce suit in the Chancery Court of Benton county, Arkansas. I think I was present all the time.

Bates' counsel contended that the court had no jurisdiction of Bates' interest in the Nebraska lands, and Bodie's counsel contended that it had. My recollection is that the court held that it had no jurisdiction of the Nebraska lands. The court asked me whether I had any authority to show that it had jurisdiction of Bates' Nebraska lands. "I remember in delivering his opinion that he had considerable to say about the land, but I cannot recall all of it. I remember that the matter of title was in issue and he stated that if he considered that he would have to pass on the title among other things, and that he had no jurisdiction over the title of the land. I remember that part definitely, and then I remember that in arriving at the amount which he allowed as alimony that he took into consideration the real estate and the home in Siloam Springs and that he restored to the wife the amount of money that she claimed was hers and that she had loaned to her husband, I think \$2,500; and then there were other items of notes, money or something that Bates, had either here or at other places, that were taken into consideration; and unless my memory is very much at fault, there was no part of the sum which he allowed as alimony arose from the Nebraska lands. I don't remember how the court arrived at the amount of alimony awarded, but I think he declined to consider the Nebraska lands."

Cross-examination:

There are two circumstances that occurred to me at the time that impressed my memory. One I have already mentioned, that I couldn't find any law to authorize the court to consider the Nebraska lands, when the court interrupted me; and the other, that Judge Davidson thought he could recover in Nebraska her interest in that land.

I remember that Walker prepared the draft of the decree and it was submitted to me. No appeal was taken. My investigation led

me to believe that the court had no jurisdiction over the Nebraska land, but had jurisdiction of the person of Bates, and jurisdiction to render any judgment he might desire. In rendering judgment for \$5,111 I have no recollection whether the court took into consideration the rental value of Bates' Nebraska land or not. "I don't swear that he didn't, but have no recollection as to whether he did or didn't."

LUCIE BODIE: Was defendant and cross petitioner in the divorce suit in Benton county, Arkansas. We were married in 1889. Lived at York, York county, Nebraska 12 or 13 years. We moved to Siloam Springs, Arkansas, in 1906.

I was present in court when the Chancellor decided the divorce case. It was after supper. The counsel of the respective sides did not retire from the presence of the court during the court session. There was no agreement on my part as to the amount the court should award as alimony. There was no figuring done by any person that I know, except the court, touching the value of the interest in the Siloam Springs property. My interest in the value of the Siloam Springs property was added to \$2,500 borrowed money.

S. P. DAVIDSON:

I reside at Tecumseh, Nebraska. Was one of Bodie's attorneys in the divorce suit in the Chancery Court of Benton county, Arkansas and participated in the trial. There was no agreement between counsel in the divorce suit as to aggregate allowance of alimony. There was some question as to whether the Siloam Springs property should be sold under the statute, or value of Bodie determined. Mortuary tables were obtained to determine her expectancy. The other items of allowance had been announced by the court. The only agreement was her life interest in the Siloam Springs property. I was present and heard everything that was said. There was a little disagreement between counsel as to Bodie's interest in the Siloam Springs property. However this was determined and added to the aggregate amount. The judge stated that he would enter the amount at \$5,111, as the allowance by agreement, and I objected to that entry being made by agreement. The judge then stated he would enter the decree by consent of the plaintiff, upon condition that Bodie would not appeal.

There was nothing said about figuring Bodie's interest in the rental value of the Nebraska lands. The Judge had excluded that entirely. I had contended that the court should take the Nebraska lands into consideration, but the Judge stated that he was prohibited by the statutes of Arkansas from taking the Nebraska lands into consideration, or their value. The court asked during the argument one of Bodie's counsel if he had any authority to show that the court had jurisdiction of the Nebraska lands, or their value, and that 135 counsel told him he had no authority. In my judgment I tried to show that the statute of limitations barred the claim of Bates' children to the Nebraska land, and the court said the more

important question was whether I had any authority that would authorize the court to take into consideration the Nebraska lands, and I stated that I had none. I took the position before the court that it was sitting as a court of equity, and that where there was a wrong it was the duty of the court to redress that wrong, and he said he felt limited by the statutes of Arkansas.

Walker had contended that the court had no jurisdiction to take the Nebraska lands into consideration and I was trying to respond to his argument.

The court announced that he would find that Bodie was entitled to a divorce; that she was entitled to recover \$2,500 as borrowed money; she was entitled to a life estate in 1-3 of the house and lot worth \$2,500; that the property couldn't be divided; it would have to be sold. It was then that the figuring began as to the value of Bodie's interest in that property. Mortuary tables were used to determine Bodie's expectancy, and from that the present value of the use of 1-3 of \$2,500 during that expectancy was determined.

There was very little discrepancy in the figures between the respective parties. The court refused to allow interest on the \$2,500 borrowed money. My recollection is that the \$5,111 was arrived at by taking 1-3 of \$7,000, the personal property, and \$2,500 borrowed money, and the present worth of her 1-3 interest in the house and lot.

136 Cross-examination:

I served notice in this suit to take the deposition of Judge Humphreys, who as Chancellor tried the divorce suit, but did not take it.

There was no question raised as to the admissibility of the depositions introduced, as to the value and rental income of the York county land, in the divorce suit. Judge Bates testified in the divorce suit what the interest of his children was in the York county land and there was no question as to the admissibility of that testimony.

Defendant's Testimony.

EDWARD BATES: My name is Edward Bates, Residence, Siloam Springs, Benton county, Arkansas. My age 73 years. We had lived at Siloam Springs several years before the divorce suit. It was claimed in the divorce suit that the Nebraska lands, or a material portion thereof, were held in trust by me for my children, Alberts Bates, Josephine Bates and Clement E. Bates. I was present at the divorce trial.

The court took into consideration my interest in the Nebraska lands in awarding alimony. He so stated at the time he entered his decree. The counsel for the respective sides in the divorce suit held a conference, as I understood it, with reference to whether a lump sum should be awarded as alimony or not. I deposited security for the alimony as required by the court.

I had three children by my first wife, all of whom are living.

In the spring of 1882 I procured a divorce from my first 137 wife, who was then living in Missouri and married one Sadie Benadem shortly after. This divorce was obtained in a county

other than that of my residence. My first wife, learning of this fact, threatened to make trouble on account of the illegality of the decree. I visited her and made an amicable adjustment, in which I agreed to convey one quarter of the York county land and three lots that I owned in York to my three children, who were minors at that time, I to have the use of the property during my life, and then the children to have it. I was to educate the children. In 1883 I was in need of money to educate the children, so I procured a guardian to be appointed and applied for leave to sell the property conveyed to my children; and the guardian applied and sold the property to me for the nominal sum of \$1,600, none of which I paid. Shortly after I sold the three lots for \$5,500 and paid off \$2,500 I had borrowed on the one quarter of land, and with the balance of the money I bought the other quarter of land; so that I had always considered that I held the Nebraska lands lying near the corporate limits of York, York county, Nebraska, consisting of 320 acres, in trust for my children by my first wife.

CLEMENT E. BATES:

I am 41 years old. Live in Siloam Springs. I am a hardware man. Was born in York, York county, Nebraska. I was present at the divorce trial between my father and Bodie in Benton county, Arkansas. I think I heard everything that was said during the trial. Bodie's counsel contended that the court had jurisdiction to consider the Nebraska lands, and my father's counsel contended that the court had no jurisdiction to consider the Nebraska land. After it was through the court made what seemed to be a review of the case. He commented on the depositions that had been taken. He talked 138 something like thirty minutes, and seemed to me to cover every feature of the case. The court said, "I will not compel this old man to deed one foot of that property," but the rental value of the York county land was considered in determining the amount of alimony. It was agreed between counsel that the alimony should be a lump sum, in lieu of an annual share of the rental of the respective properties. It was then agreed between the parties to the divorce suit that the household goods should be divided as set forth in the decree.

W. L. KIRKPATRICK:

Age 43. Reside in York, Nebraska and have for the last 15 years. I am a lawyer. Am acquainted with the value of lands in York county, Nebraska. Know the Bates' land. Have had charge of the renting and collecting the rent on the same for some years, and know the value and rental income. From 1903 to 1910 the Bates' land was rented as follows:

1903	.....	\$400.00
1904	.....	656.10
1905	.....	650.00
1906	.....	665.00
1907	.....	665.00
1908	.....	665.00
1909	.....	665.00
1910	.....	725.00

The taxes during the nine years were \$951.51. There were other expenses and repairs on the farm. The actual value of the land is about \$62.50 per acre.

W. B. MALCOLM: I am 43 years old. Reside in York county, Nebraska. Am a real estate broker. Know the value of lands in York county. Am acquainted with the Bates' land near the corporate limits of York, York county, Nebraska. In my opinion the 139 lands are worth from \$65 to \$75 per acre.

C. A. WILDMAN: I am 28 years old. Reside in York, Nebraska, and a real estate dealer by occupation. Know the Bates' land and its value. In my opinion it is worth about \$70 to \$75 per acre.

CHARLES F. BAUGHAN: I am 38 years old. Reside in York, York county, Nebraska. Business a real estate dealer. Am familiar with the Bates' land and its value. In my opinion it is worth \$75 per acre.

DOUGLAS WENDELL: Am 50 years old. Reside in York, Nebraska, and on the Bates' farm. My first year I paid \$650 rent; the second year, \$725.00.

T. H. HUMPHREYS: Am 49 years old; Chancellor of the 11th Chancery District of Arkansas. Am member of bar of state and federal court. Benton county is in my district. Presided at the divorce trial between Bates and Bates. Have examined the record in that case today.

Numerous depositions were read and considered on the trial relating to the value and rental income of Bates' property in York county, and considered by the court. The land was supposed to be in the name of his children, or in his name as trustee for the children.

The decree for alimony was a lump sum of \$5,111 "in lieu of any interest that she might have, or claim she might have 140 for any sum." I first intimated what the court would do in the way of a property finding, and the parties agreed on a lump sum. They agreed on this lump sum as a final settlement from which no appeal was to be taken. Bates was required to give security for the payment of amount awarded. The court had jurisdiction of the parties and held it had not of the land in Nebraska, but did

have jurisdiction to consider its value in determining the amount of alimony.

Cross-examination:

I think the court asked counsel if they had any authorities bearing on the question whether the court had authority to take into consideration the value of Bates' Nebraska lands. Knowing the law as I thought I did, I don't think I stated that there was no law justifying the court in taking the value of the Nebraska land into consideration. It was not the first time the proposition had been raised before me.

I remember that Bodie claimed \$2,500 as borrowed money, but the money had merged into Bates' estate. I did not understand it entered into this decree. I think this was a lump sum agreement on your part, provided you could get the cash to end the controversy both as to divorce and as to property rights.—I have no definite recollection as to any specific amounts that went into it, other than that it just covered the whole claim. I don't remember that the \$5,- was composed of \$2,500 borrowed money and \$2,333 as one third of Bates' property. I don't know how counsel adjusted it on the outside, for I am quite sure it was not the amount I indicated I would allow. I decided that I had the right to take the whole thing into consideration and that I would protect her in the collection of the amount awarded. The attorneys went out and adjusted the amount with Bates. I don't think I was a party to the 141 figuring. That was a private agreement between counsel which they announced to the court.

I don't remember stating after the trial that if I had not taken the Nebraska land into consideration I would have held one quarter of the Nebraska lands belonging to the Bates' children. I am quite sure I took the Nebraska lands into consideration. Based on Bates' Arkansas property alone the amount allowed would have been too much. "As an abstract proposition if a husband owned 320 acres of land worth \$100 per acre, and a house and lot worth \$2,500 and personal property worth \$7,000, an allowance of \$5,111 to the wife would perhaps not be her share under the Arkansas law; but as a concrete proposition, under all the facts and circumstances of this case, I am inclined to think that it was a very equitable settlement between the parties."

Redirect:

The evidence showed that Lucie Bodie was the third wife of Edward Bates and that three children were born to him by his first wife, the only children he had; that there was no offspring by Lucie Bodie.

My understanding was that counsel for both sides agreed to the amount; that the judgment was a complete and amicable settlement between the parties of all property rights involved.

J. WYTHE WALKER: I am 49 years old. Reside in Fayetteville, Arkansas. Was born there. Am a lawyer.

I am acquainted with Section 2681 of Kirby's Digest of the Statutes of Arkansas relating to divorce and alimony. This section was passed December 18, 1837 and went into effect March 10, 142 1838. It reads as follows:

"When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable."

This statute as in force at the time of the trial of the divorce case between Bates and Bates in Benton county, Arkansas in 1911. I represented Judge Bates in that trial. I came to York, Nebraska to take depositions, which were used in that trial. The cause was tried before the Hon. T. H. Humphreys, Chancellor of the 11th District of Arkansas. That court has general equitable jurisdiction under the Arkansas law. The right of the court to take into consideration Bates' property in Nebraska was a subject of controversy between counsel on the trial of the divorce case.

The depositions taken in York county, Nebraska relating to the value and rental income of Bates were read in evidence to the court. The counsel for Bodie contended that the court had jurisdiction to take into consideration Bates' interest in the York county land, and I argued that it had not. The court announced that it was not a new proposition to him; that while he couldn't send an officer to Nebraska to lay off any part of the land by metes and bounds as alimony, he had personal jurisdiction of each of them; and had jurisdiction to enforce any judgment which he might render; that his finding was that the court had jurisdiction to consider Bates' Nebraska property in awarding alimony. Counsel for the respective sides then retired and made figures as to the amount of alimony, and finally agreed upon \$5,111. The court then stated that it proposed to render a judgment that could be collected.

I prepared the original draft of the decree at the request of counsel on the other side. This, with very slight interlineations, became the decree of the court, having been O. K'd by counsel on 143 both sides.

In reference to the \$2,500 claimed by Bodie as borrowed money, I took the position that it had been merged into Bates' estate and under section 2684 Kirby's Digest could not be recovered, and my understanding was that the court held with me on that point and the \$2,500 that Bodie sought to recover as borrowed money was not taken into consideration in the amount awarded to Bodie.

Counsel used mortuary tables as to Mrs. Bates' expectancy, and the rental income of the York county land in figuring up the amount of alimony awarded in the decree.

Cross-examination:

I remember distinctly that the court asked counsel on both sides

"Have you any authority on that point?" and counsel stated they had not.

The court did not say he could not consider the Nebraska land because Bates' children were shown to have some interest in it; but he did say that Bates was trustee for one quarter section of the land that belonged to the children and that could not be considered, but the other land could.

Notwithstanding the court asked Bodie's counsel if they had authority to take the Nebraska lands into consideration, the court announced that it was not a new question with him, that that matter had been before him in other cases.

It is not correct that Bodie's counsel objected to a decree by consent. Her counsel interlined my draft of the decree with the words "in full of alimony and all other demands set forth in cross bills."

My recollection is that in figuring the amount of the decree we ascertained that the net rental income of the Nebraska land, 144 after the payment of taxes and repairs, would amount to \$350 to \$450, and the present worth of her one-third in such income was taken into consideration in making up the amount of alimony that was awarded.

145 It is hereby agreed by and between the respective parties to the above entitled suit that the foregoing, beginning with and including the exemplified transcript of the record of the divorce suit between Bates and Bates, heretofore pending in the Chancery Court of Benton county, Arkansas duly certified under date of June 12, 1914, and including Sections 2681 and 2684 of Kirby's Digest of the Statutes of Arkansas relating to divorce and alimony, and the testimony of the following witnesses reduced to narrative form, that is to say:

George W. Post, Harris M. Childs, S. A. Myers, Charles F. Stroman, C. H. Kolling, W. W. Wyckoff, H. W. Brott, M. C. Frank, W. M. Heaslet, F. G. Lindsey, D. C. Shannon, L. H. McGill, Lucie Bodie, S. P. Davidson, Edward Bates, Clement E. Bates, W. L. Kirkpatrick, W. B. Maleolm, C. A. Wildman, Douglas Wendell, T. H. Humphreys, and ending with the testimony of J. Wythe Walker, as hereinbefore set out, constitute all of the evidence adduced by the respective parties on the trial of this cause and embodied by a settled Bill of Exceptions, in the record;

That all of the testimony in the record relating to the value of the Nebraska lands belonging to Bates was taken in the form of depositions by the respective parties and used on the trial of the divorce suit between the parties in the Chancery Court of Benton county, Arkansas, and was by agreement, withdrawn from the record in the Chancery Court of Benton county, Arkansas and reintroduced in the trial of this suit.

The Clerk of the Supreme Court of the State of Nebraska will be governed by this agreement in preparing the record of the Supreme Court of the United States, so far as the same relates to that part of the record known as the Bill of Exceptions.

This agreement shall constitute a part of the record.

146 In Witness Whereof the parties hereto have hereunto set their hands this 28th day of February, 1916.

LUCIE BODIE,
By SAMUEL P. DAVIDSON,
Her Attorney.
EDWARD BATES,
By A. C. RICKETTS,
*Associated with him Field, Ricketts and Ricketts and
W. L. Kirkpatrick.*

147 And, on the 10th day of February, 1916, there was filed in the office of the clerk of the Supreme court of Nebraska, by the said Edward Bates, a certain Petition for Writ of Error. The said original petition for a Writ of Error, together with the allowance thereof by the Chief Justice of the supreme court of Nebraska endorsed thereon, is hereto attached.

148 In the Supreme Court of the State of Nebraska.

No. 19146.

LUCIE BODIE, Appellee,
vs.
EDWARD BATES, Appellant.

Petition for Writ of Error.

Comes now Edward Bates, the appellant in the above entitled cause, and shows to the court that in the records, proceedings and discussions of this court, the same being the highest court of the State of Nebraska in which a decision could be had in this suit, manifest errors have occurred, greatly to the damage of said Edward Bates, appellant:

1. That as appears in the record and proceedings in the above entitled cause, this said court on the 3rd day of April, 1914 reversed the judgment of the District Court of York County, Nebraska sustaining the demurrer of said Edward Bates, appellant, to the petition of Lucie Bodie, appellee and remanded said cause to the District Court of York County for further proceedings, thereby holding that said petition set forth a good and sufficient cause of action in favor of Lucie Bodie, appellee, and against Edward Bates, appellant, notwithstanding the fact that it appeared on the face of said petition that in a suit for divorce and alimony theretofore pending in the Chancery Court of Benton County, Arkansas between Edward Bates and Lucie Bodie, that court then and 149 there having jurisdiction of the parties and the subject matter of said suit for divorce and alimony, and on the 2nd day of March, 1911 it rendered a judgment therein, dissolving the

marital relation theretofore existing between the said parties and awarding to Lucie Bodie her maiden name and the sum of \$5,111 in full of alimony. The effect of the judgment of this court reversing the judgment of the District Court of York County, Nebraska, wherein it sustained the demurrer of Edward Bates, appellant to the petition of Lucie Bodie, Appellee, was to deny to Edward Bates, appellant, full faith and credit in the judicial proceedings of the Chancery Court of Arkansas, dissolving the marital relation between said parties, and awarding to Lucie Bodie a large sum of alimony, to which he was entitled under Section One, Article IV of the Constitution of the United States.

2. It further appears in the record and proceedings that there was drawn in question in this suit the full faith and credit due to a judgment of divorce and alimony between the parties hereto, rendered by the Chancery Court of Benton County, Arkansas on the 2nd day of March, 1911, which court had jurisdiction of the parties and the subject matter of divorce and alimony, and which judgment was alleged to be a complete bar to this suit in the answer of Edward Bates, appellant. That the court, by its judgment dated January 15th, 1916, affirming the judgment of the District Court of York County, Nebraska, denied Edward Bates, appellant, the benefit of the Arkansas judgment as a bar to a suit for further alimony in the courts of this state, contrary to the provisions of Section One of Article IV of the Constitution of the United States.

150 3. It further appears from the record and proceedings of this said court that subsequent to the rendition of the final judgment herein on the 15th day of January, 1916 the said Edward Bates, appellant, filed a motion for re-hearing under the rules and practice of this said court, and that on the 5th day of February, 1916 this said court overruled said motion for rehearing, and the judgment of this court entered on the 15th day of January, 1916 affirming the judgment of the District Court of York County wherein it awarded \$10,000 to the appellee, Lucie Bodie, as additional alimony, became the final and fixed judgment of this court.

All of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that a writ of error be allowed and that a transcript of record proceedings and papers upon which said decrees or judgments were rendered duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such court in such cases made and provided, and in accordance with law and justice.

FIELD, RICKETTS & RICKETTS, AND
W. L. KIRKPATRICK,

Attorneys for Appellant.

Writ of Error Allowed upon the execution of a bond by Edward Bates with good and sufficient surety in the sum of \$1000.00, said bond when approved to act as supersedeas.

Dated Feb. 10, 1916.

[Seal Supreme Court of Nebraska.]

A. M. MORRISSEY,
*Chief Justice of the Supreme Court
of the State of Nebraska.*

Attest:

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

151 [Endorsed:] No. 19146. In the Supreme Court of the State of Nebraska. Lucie Bodie vs. Edward Bates. Petition for Writ of Error. Supreme Court of Nebraska, Filed Feb. 10, 1916. H. C. Lindsay, Clerk. Filed, Ricketts & Ricketts, and W. L. Kirkpatrick, Attorneys for Appellant.

152 And, on the same day, to-wit: February 10, 1916, there was filed in the office of the clerk of the supreme court of Nebraska by the said Edward Bates, a certain Assignment of Errors, which said original Assignment of Errors, with prayer for reversal, is hereto attached.

153 In the Supreme Court of the State of Nebraska.

LUCIE BODIE, Appellee,
vs.
EDWARD BATES, Appellant.

Assignment of Errors.

Comes now the appellant Edward Bates and says that in the record and proceedings in the above entitled cause there is manifest error in this:

1. The Supreme Court erred in reversing the judgment of the District Court of York County, Nebraska which had sustained the demurrer of Edward Bates, appellant to the petition of Lucie Bodie, appellee, thereby overruling said demurrer and remanding said cause to the District Court of York County, Nebraska, which ruling was entered on the 3rd day of April, 1914.

2. The Supreme Court erred in overruling the demurrer of the appellant, Edward Bates to the petition of appellee, Lucie Bodie, thereby holding that the petition stated a cause of action in favor of the appellee, Lucie Bodie and against the appellant, Edward Bates, when it plainly appeared on the face of said petition that in a divorce proceeding in the Chancery Court of Benton County, Arkansas between Edward Bates and Lucie Bodie, the court then

154 and there having jurisdiction of the parties and the subject matter did, on the 2nd day of March, 1911 by its judgment dissolve the marital relation theretofore existing between said parties, and restored to Lucie Bodie her maiden name and awarded to her \$5,111.00 in full of alimony, which judgment under Section One of Article Four of the Constitution of the United States barred the said Lucie Bodie from maintaining this suit in the courts of the state of Nebraska to recover further alimony.

3. The court erred in its judgment entered on the 15th day of January, 1916 affirming the judgment of the District Court of York County awarding to the appellee Lucie Bodie the sum of \$10,000.00 as additional alimony, because it appears by the undisputed record that in a suit for divorce and alimony between Edward Bates and Lucie Bodie in the Chancery Court of Benton County, Arkansas then and there having jurisdiction of the parties and the subject matter did, on the 2nd day of March, 1911 dissolve the marital relation between said parties and restored to Lucie Bodie her maiden name and awarded her the sum of \$5,111 in full of alimony, which was duly paid by Edward Bates and received by Lucie Bodie, which was interposed as a complete bar to this suit to recover further alimony under Section One of Article IV of the Constitution of the United States.

4. Because the Supreme Court erred in holding that Lucie Bodie, appellee, could maintain this suit to recover additional alimony in the courts of the state of Nebraska when she had been divorced from the appellant, Edward Bates by the Chancery Court of Benton County, Arkansas, restored to her maiden name and recovered \$5,111 in full of alimony in that court. In so holding, this Supreme Court has denied to Edward Bates, appellant, the benefit of the full faith and credit in the judicial proceedings of the Chancery Court of Arkansas, to which he was entitled under Section 1, Article IV of the Constitution of the United States.

155 5. The Supreme Court erred in holding that the Chancery Court of Benton County, Arkansas had no jurisdiction to take into consideration property of Edward Bates situate in the state of Nebraska in its judgment dissolving the marital relation between said parties, in which the subject of alimony was put in issue, and tried and determined by that court, and the sum of \$5,111 was awarded Lucie Bodie as alimony.

6. The Supreme Court erred in holding that the Chancery Court of Benton County, Arkansas which heard and tried the issues in a suit for divorce between Edward Bates and Lucie Bodie, having jurisdiction of the parties and the subject matter, did not in its judgment entered on the 2nd day of March, 1911 take into consideration the interest of Edward Bates in certain lands in York County, Nebraska when it awarded Lucie Bodie the sum of \$5,111 in full of alimony.

7. The Supreme Court erred because in its judgment entered on the 15th day of January, 1916 it denied to Edward Bates the benefit of full faith and credit in the statutes of Arkansas and

the judicial proceedings of the Chancery Court of Benton County of said state, which were plead by Edward Bates, appellant as a complete bar to the suit of Lucie Bodie, appellee to recover further alimony in the courts of Nebraska under Section 1 of Article IV of the Constitution.

156 Wherefore for these and other manifest errors in the record, Edward Bates prays that the decision and judgment of the Supreme Court of the State of Nebraska entered on the 15th day of January, 1916 and made final by overruling appellant's motion for a rehearing on the 5th day of February, 1916, may be reversed and said cause dismissed.

FIELD, RICKETTS & RICKETTS, AND
W. L. KIRKPATRICK,

Attorneys for Appellant.

157 [Endorsed:] 19146. In the Supreme Court of the State of Nebraska. Lucie Bodie vs. Edward Bates. Assignment of Errors. Supreme Court of Nebraska. Filed Feb. 10, 1916. H. C. Lindsay, Clerk. Field, Ricketts & Ricketts, and W. L. Kirkpatrick, Attorneys for Appellant.

158 And, on the same day, to-wit: February 10, 1916, there was issued out of the supreme court of Nebraska by the Chief Justice thereof, a certain Citation in said cause, which Citation with proof of service thereof attached, was, on February 12, 1916, returned to and filed in the office of the clerk of said supreme court of Nebraska. Said original Citation, with proof of service thereof, is hereto attached.

159 In the Supreme Court of the State of Nebraska.

LUCIE BODIE, Appellee,
vs.
EDWARD BATES, Appellant.

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

To Lucie Bodie, Greeting:

You are hereby cited and admonished to appear in the Supreme Court of the United States at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Edward Bates is plaintiff in error and Lucie Bodie is defendant in error, to show cause if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Andrew M. Morrissey, Chief Justice of

the Supreme Court of the State of Nebraska this 10th day of February in the year of our Lord One Thousand Nine Hundred and Sixteen.

[Seal Supreme Court of Nebraska.]

ANDREW M. MORRISSEY,

Chief Justice of the Supreme Court of the State of Nebraska.

H. C. LINDSAY, *Clerk,*
By P. F. GREENE, *Deputy.*

160 UNITED STATES OF AMERICA,
State of Nebraska, Johnson County. ss:

J. M. Ehmen, being first duly sworn on his oath says that he served the within writ of citation on Lucie Bodie on the 11th day of February, 1916 by delivering to Lucie Bodie in Person a true and correct copy thereof.

M. EHmen, *Sheriff.*

Subscribed in my presence and sworn to before me this 11th day of February, 1916.

[Notarial Seal Jay C. Moore, Johnson County, Nebraska. Commission Expires June 24, 1917.]

JAY C. MOORE,
Notary Public.

161 [Endorsed:] In the Supreme Court for the State of Nebraska. Lucie Bodie vs. Edward Bates. Citation on Writ of Error. Supreme Court of Nebraska. Filed Feb. 12, 1916. H. C. Lindsay, Clerk. Field, Ricketts & Ricketts and W. L. Kirkpatrick, Attorneys for Appellant.

162 And, on the same day, to-wit: February 10, 1916, there was issued in said cause out of the supreme court of the United States by R. C. Hoyt, clerk of the district court of the United States for the District of Nebraska, Lincoln Division, a certain Writ of Error, which Writ of Error was duly allowed by the Chief Justice of the supreme court of the state of Nebraska. The said original Writ of Error, with the allowance thereof endorsed thereon, is hereto attached.

163 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court of the State of Nebraska before you, or some of you, being the highest court of law and equity of the said State of Nebraska, in which a decision could be had in the said suit between Lucie Bodie,

Appellee, and Edward Bates, Appellant, wherein there was drawn in question the full faith and credit due to the statutes and judicial proceedings of the Chancery Court of the state of Arkansas under Section One of Article IV of the Constitution of the United States, in that on the 2nd day of March, 1911 the Chancery Court of Benton County, Arkansas in a divorce proceeding pending in that court between said Edward Bates and said Lucie Bodie, rendered a judgment dissolving the marital relation theretofore existing between said parties, restoring said Lucie Bodie to her maiden name and awarding her the sum of \$5,111 in full of alimony; said court then and there having jurisdiction of the parties and the subject matter of divorce and alimony, and said judgment for alimony having been duly paid and satisfied, and the said Edward Bates claims said judgment to be a full and complete bar to the suit of Lucie Bodie for further alimony in this cause, and the decision was against the bar of said judgment of the Chancery Court of Benton County, Arkansas set up by Edward Bates, appellant under Section One of Article IV of the Constitution of the United States; a manifest error, therefore, hath happened to the great damage of said Edward Bates, as by his complaint appears.

164 We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal and distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C. within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 10 day of February, in the year of our Lord One Thousand Nine Hundred and Sixteen.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT, Clerk,
By J. H. McCAY,
Deputy Clerk of the District Court of the United
States for the District of Nebraska, Lincoln Division.

Writ of error allowed.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

164½

Return to Writ of Error.

UNITED STATES OF AMERICA,
State of Nebraska, Lancaster County, ss.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof I hereto subscribe my name and affix the seal of the Supreme Court of the State of Nebraska, this — day of —, 1916.

Clerk of the Supreme Court of the State of Nebraska.

165 [Endorsed:] 19146. Edward Bates, Plaintiff in Error, vs. Lucie Bodie, Defendant in Error. Writ of Error. Supreme Court of Nebraska. Filed Feb. 10, 1916. H. C. Lindsay, Clerk.

166 And, on the 6th day of March, 1916, there was filed in the office of the said clerk of the supreme court of Nebraska by the said Edward Bates, as principal, a certain Bond for Damages and Costs on said appeal, which said Bond was, on said 6th day of March, 1916, duly approved by A. M. Morrissey, Chief Justice of the supreme court of the state of Nebraska. A copy of said bond is attached hereto.

167 In the Supreme Court of the State of Nebraska.

LUCIE BODIE, Appellee,
vs.
EDWARD BATES, Appellant.

Bond on Writ of Error.

Know all men by these presents: That we, Edward Bates, as principal, and the American Surety Company of New York, a corporation, are held and firmly bound unto Lucie Bodie in the sum of One Thousand Dollars (\$1000.00), lawful money of the United States, to be paid to her and her executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our heirs, executors, administrators and successors by these presents.

Sealed with our seals and dated the 6th day of March, 1916.

Whereas the above named Edward Bates has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of the State of Nebraska in the above entitled cause,

Now therefore, the condition of this obligation is such that if the above named Edward Bates shall prosecute his said writ of error to

effect and answer all damages and costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

168

[SEAL.]

EDWARD BATES,
By FIELD, RICKETTS & RICKETTS AND
W. L. KIRKPATRICK, *His Attorneys.*
AMERICAN SURETY COMPANY OF
NEW YORK,
By F. M. HALL, *Att'y in fact.*
By ERNEST C. FOLSOM,

Res. Vice-President.

The foregoing bond is approved both as to sufficiency and form this 6th day of March, 1916.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of Nebraska.

Endorsed: No. 19146, in the Supreme Court of the State of Nebraska, Lucie Bodie vs. Edward Bates, Bond on Writ of Error. Supreme Court of Nebraska, Filed Mar. 6, 1916, H. C. Lindsay, Clerk.

169 And, on the 1st day of March, 1916, there was filed in the office of the clerk of the supreme court of Nebraska, a certain Praeclipe directing the clerk of said court to prepare a transcript of the record in said cause for the Supreme Court of the United States, as required by said writ of error. Said original Praeclipe is attached hereto.

170 In the Supreme Court of the State of Nebraska.

No. 19146.

LUCIE BODIE, Appellee,
vs.
EDWARD BATES, Appellant.

Praeclipe for Record for Supreme Court of United States.

The Clerk of the Supreme Court of the State of Nebraska will in preparing transcript of the records in the above entitled cause for the Supreme Court of the United States, include the following:

1. Copy of petition for writ of error, with the allowance thereon.
2. Copy of assignment of errors.
3. Original writ of error.
4. The original citation, with proof of service.
5. Copy of bond and approval.

Record.

1. Copy of amended petition.
2. Demurrer to amended petition, which appears in the record brought to this court on the first appeal.
- 2½. Judgment of trial court sustaining demurrer.
3. Judgment of the court reversing and remanding the cause.
4. Opinion of the court reversing and remanding the cause.

171 5. Bates answer with exhibits.

6. Bodie's reply to Bates' answer.
7. Judgment of the trial court.
8. Bates' motion for new trial.
9. Journal entry overruling motion for new trial.
10. Judgment affirming judgment of the trial court.
11. Opinions affirming the judgment of the trial court, and dissenting opinion.

Bill of Exceptions.

1. All of pages 1 to 18 inclusive.
2. Exhibit 2, page 19.
3. Exhibit 3, page 20.
4. All of the testimony of George W. Post, Harris M. Childs, S. A. Myers, Charles F. Stroman, C. H. Kolling, W. W. Wyckoff, H. W. Brott, M. C. Frank, W. M. Heaslet, F. G. Lindsey, D. C. Shannon, L. H. McGill, Lucie Bodie, S. P. Davidson, Edward Bates, Clement E. Bates, W. L. Kirkpatrick, W. B. Malcolm, C. A. Wildman, Charles F. Baughan, Douglas Wendell, T. H. Humphreys and J. Wythe Walker as reduced to narrative form of agreement of parties.
5. The agreement between parties reducing the evidence contained in the record to narrative form.

A. C. RICKETTS,
Associated with him:
FIELD, RICKETTS & RICKETTS AND
W. L. KIRKPATRICK,
Attorneys for Plaintiff in Error.
SAMUEL P. DAVIDSON,
Attorney for Defendant in Error.

172 [Endorsed:] No. 19146. In the Supreme Court of the State of Nebraska. Lucie Bodie vs. Edward Bates. Praeipe for Record for Supreme Court of United States. Supreme Court of Nebraska. Filed Mar. 1, 1916. H. L. Lindsay, Clerk. Field, Ricketts & Ricketts, Attorneys for Plaintiff-in-Error.

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Certificate of Lodgment.

SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 10, 1916, in the matter of *Lucie Bodie v. Edward Bates*:

1. Two copies of the writ of error, as herein set forth,—one for the plaintiff, *Lucie Bodie*, and one to file in my office.

2. That on March 6, 1916, there was lodged with me as such clerk in the said case, the original bond of which a copy is herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this March 7, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

174

Authentication of Record.

SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages numbered from 1 to 172, inclusive, are a true, full and complete copy of the following portions of the records and proceedings in the case of *Lucie Bodie, appellee, v. Edward Bates, appellant*, and also of the opinion of the court rendered therein and dissenting opinion as the same now appear on file in my office, to-wit:

1. Copy of amended petition.
2. Demurrer to amended petition which appears in the record brought to this court on the first appeal.
3. Judgment of trial court sustaining demurrer.
4. Judgment of supreme court reversing and remanding the cause.
5. Opinion of the supreme court reversing and remanding the cause.
6. Bates' answer with exhibits.
7. Bodie's reply to Bates' answer.
8. Judgment of the trial court.
9. Bates' motion for new trial.
10. Journal entry overruling motion for new trial.
11. Judgment of supreme court affirming the judgment of the trial court.
12. Opinions affirming the judgment of the trial court, and dissenting opinion.
13. All of pages 1 to 20, inclusive, of the bill of exceptions.

14. Stipulation of parties in re testimony contained in the bill of exceptions to be made a part of this record.

175 15. Original petition for writ of error, with allowance thereof.

16. Original assignment of errors, with prayer for reversal.

17. Original citation on writ of error, with proof of service thereof.

18. Original writ of error, with allowance thereof.

19. Copy of bond on writ of error, with approval thereof.

20. Original praecipe for record for Supreme Court of United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this March 7, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

176 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the supreme court of the United States a duly certified transcript of the record and proceedings in the within entitled case as called for and required by the praecipe filed in my office for the record in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said supreme court of Nebraska, at Lincoln, this March —, 1916.

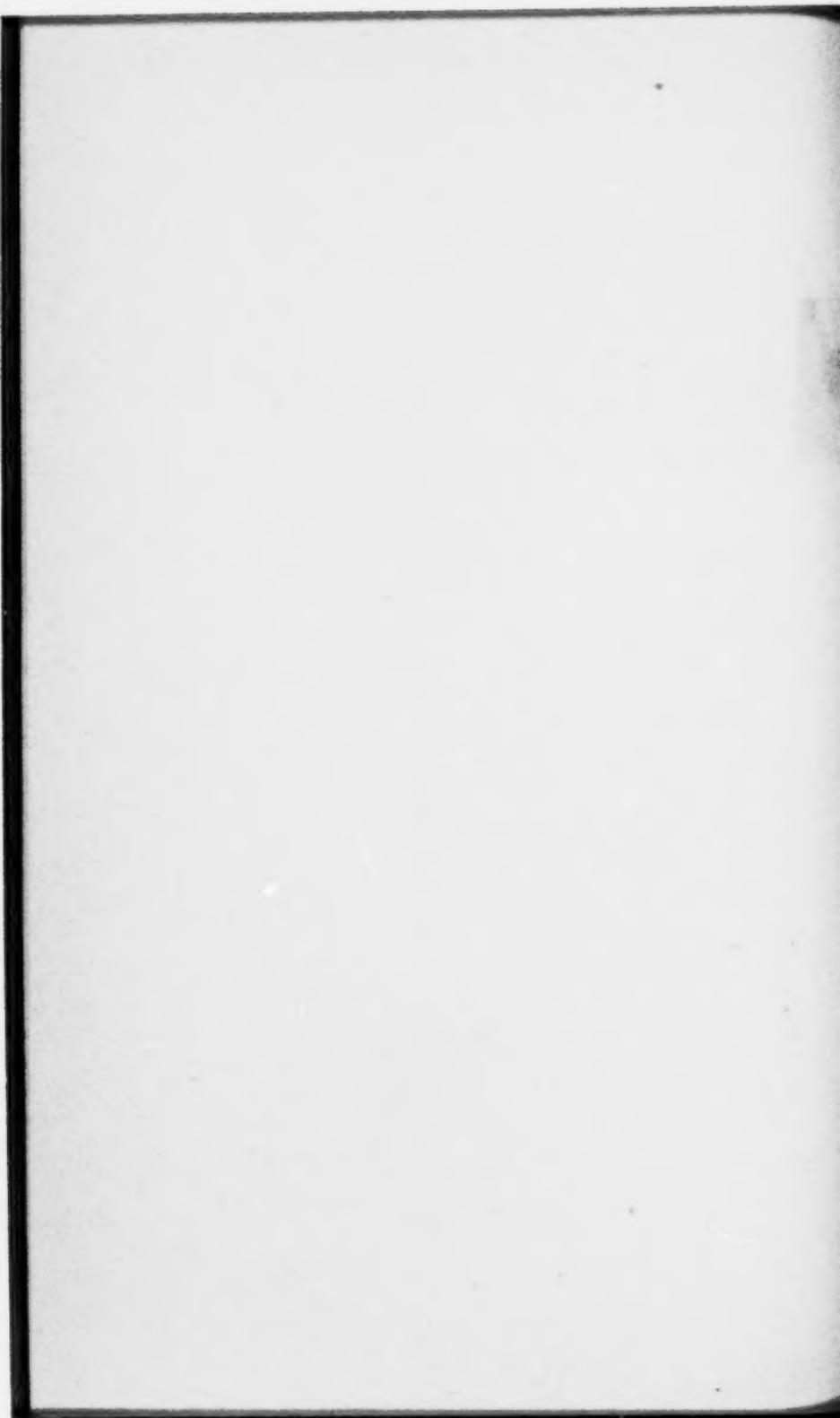
[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

Fees for this transcript: \$38.05. Paid by A. C. Ricketts.
H. C. LINDSAY,
Clerk Supreme Court.

Endorsed on cover: File No. 25,173. Nebraska Supreme Court. Term No. 406. Edward Bates, plaintiff in error vs. Lucie Bodie. Filed March 10th, 1916. File No. 25,173.

91



Office Supreme Court, U. S.
FILED
APR 19 1916
JAMES D. MAHER
CLERK

No. 8

120

IN THE
SUPREME COURT
OF THE
UNITED STATES

EDWARD BATES, PLAINTIFF IN ERROR,

VS.

LUCIE BODIE, DEFENDANT IN ERROR.

**MOTION TO DISMISS THE WRIT OF ERROR, OR AFFIRM THE
JUDGMENT HEREIN.**

WRIT OF ERROR TO THE SUPREME COURT OF NEBRASKA.

FIELD, BACKHURST & RICKERTS and W. L. KIRKPATRICK,
Attorneys for Plaintiff in Error.

SAMUEL P. DAVIDSON, of Tecumseh, Nebraska, Attorney for
Defendant in Error.

WEKESER, The Brief-Man, Lincoln, Nebraska

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IN THE
SUPREME COURT
OF THE
UNITED STATES

EDWARD BATES, PLAINTIFF IN ERROR,
VS.

LUCIE BODIE, DEFENDANT IN ERROR.

**MOTION TO DISMISS THE WRIT OF ERROR, OR AFFIRM THE
JUDGMENT HEREIN.**

WRIT OF ERROR TO THE SUPREME COURT OF NEBRASKA.

FIELD, RICKETTS & RICKETTS and W. L. KIRKPATRICK,
Attorneys for Plaintiff in Error.

SAMUEL P. DAVIDSON, of Tecumseh, Nebraska, *Attorney for
Defendant in Error.*

And now comes said defendant in error, and moves the court to dismiss the writ of error herein, or affirm the judgment of the supreme court of Nebraska herein, for the reasons and upon the grounds following, to-wit:

1. This being a suit to recover additional alimony, by a former wife, from her former husband, it is within the exclusive purview and jurisdiction of the state court, and a writ of error will not lie from this court, to empower it to review and re-examine the judgment of the state supreme court therein.

2. The construction or application of no provision of the constitution of the United States, nor of any law of the United States, nor of any treaty made by the United States, is involved in this suit.

3. The validity of no statute of any state, on the ground that it is repugnant to the constitution, or treaties, or laws of the United States is involved, or drawn in question, herein.

4. None of the facts, conditions or provisions stated in section 237 of The Judiciary Act of March 3, 1911, providing what causes from a state court can be reviewed and re-examined in this court, are raised or involved in this case.

5. This great court does not have jurisdiction to review or re-examine the judgment of the supreme court of Nebraska, upon a writ of error thereto, in such a case as this.

6. The pleadings, the judgment appealed from and the opinions of the supreme court of Nebraska, conclusively show that the claim of plaintiff in error that "full faith and credit" has been denied to the judgment of a court of a sister state has been denied herein, is not based upon any substantial basis, and is frivolous and without merit.

In support of this motion, defendant in error refers to the original pleadings, upon which this case was tried in the court below, to the judgment appealed from, and the opinions of the supreme court of Nebraska affirming said judgment, copies of all of which are printed and attached to this motion; and defendant in error objects to the jurisdiction of this court herein.

Respectfully submitted,
Samuel P. Davison
Attorney for Defendant in Error.

The petition upon which the cause was tried was filed in the district court for York county, Nebraska, on the 24th day of November, 1911, and is in the words and figures following, to-wit:

PETITION.

State of Nebraska, }
York County, } ss.

In the District Court for Said County.
Lucie Bodie, Plaintiff,

vs.

Edward Bates, Defendant.

And now comes said plaintiff, and for her amended petition herein alleges that she is, and ever since April 1st last, has been a resident of Johnson county, Nebraska; that prior to March 1st, 1911, and for several years she had been a resident of Benton county, in the state of Arkansas. In the month of January, 1889, while being a resident of York county in the state of Nebraska, she was married to defendant, and after her said marriage and up until the commencement of the suit below mentioned, she conducted and demeaned herself towards said defendant in a dutiful, chaste and wifely manner. Soon after her said marriage to defendant he became addicted to drinking intoxicating liquors to excess, and would very frequently get drunk, and go off on a drunken spree, and this plaintiff would be compelled to, and did send after him and frequently have him brought home in a drunken condition, and filthy, and plaintiff be compelled to clean up the furniture and clothing soiled by the filth he would produce; and plaintiff did so clean up after him very often. And this habit of defendant continued to grow worse, and his drunken sprees became more frequent as the time passed, but this plaintiff continued to do her duty in her attempts to care for defendant, and used her best endeavors to persuade and induce this defendant to cease his drunken sprees, but without avail. During such drunken sprees he became very abusive and would use coarse and indecent language to and in the presence of this plaintiff, until her position became almost unbearable.

Sometime before the 1st day of March, 1911, while plaintiff and defendant were living in Benton county, in the state of Arkansas, without any just cause therefor, this defendant commenced a suit against this plaintiff in the court of chancery of Benton county, Arkansas, for divorce upon the alleged grounds of indignity, cruelty and

infidelity. On being served with summons in that cause, this plaintiff as defendant, filed her answer and cross-complaint, or cross-bill, in which she denied the allegations in the bill or complaint of the plaintiff in that cause, and alleged as grounds for her prayer for divorce and an allowance of and for alimony, the facts of said plaintiff's drunkenness and unmanly and cruel treatment of this plaintiff, the defendant therein, amounting to gross indignity; and alleging in general terms the amount and value of the property of the plaintiff in that suit. Among other property alleged to belong to said plaintiff in that suit, this plaintiff as defendant in that suit alleged that said plaintiff owned the lands situated and lying in York county, Nebraska, known and described as follows:

The east half of the southeast quarter of section seven (7), the southwest quarter and south half of the northwest quarter of section eight (8), all in township ten (10) north, in range two (2) west, in York county, Nebraska.

The cross-complaint further alleged that plaintiff in that suit owned property situated in Benton county, Arkansas, of considerable value, consisting of a dwelling house and lot on which the parties resided, and personal property consisting of money, notes, mortgages, furniture, etc.

Said cause was tried in said court of chancery on the first days of March, 1911, and after a full hearing thereof, said court of chancery found the issues in that suit against the plaintiff therein, and in favor of the defendant therein, who was cross-complainant, and who is the plaintiff herein, and entered a decree granting this plaintiff, who was defendant therein, an absolute divorce from the complainant therein, and restoring this plaintiff to her maiden name, of Lucie Bodie; a copy of which decree is hereto attached and marked "Exhibit 'A,'" and made a part hereof. Said court of chancery further found that the complainant in that suit was justly indebted to the defendant therein for borrowed money amounting to \$2,500.00; that the value of said house and lot was \$2,500.00 and that complainant's personal property was of the value of about \$7,000.00; and that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the state of Arkansas, and that in consequence of that fact, in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from

taking into the account the above mentioned property situated in York county, Nebraska. Said court was limited by the laws of Arkansas from taking into consideration said property lying in York county, Nebraska, in determining the amount of alimony that should be granted to defendant in that suit, who is plaintiff herein.

The laws of the state of Arkansas then in force, among other things, provides, as one of the grounds authorizing the courts of chancery to grant a divorce, as follows:

"Where either party has been addicted to habitual drunkenness for the space of one year, or shall be guilty of such cruel or barbarous treatment as to endanger the life of the other, or shall offer such indignities to the person of the other as shall render his or her condition intolerable."

The laws of the state of Arkansas further provide:

"Where the divorce is granted to the wife each party is restored to all property not disposed of at the commencement of the action, which either party obtains from or through the other, during the marriage, and in consideration or by reason thereof; and the wife so granted a divorce from the husband, shall be entitled to one-third of the husband's personal property absolutely, and one-third of all lands of which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form.

"Circuit courts have general equity jurisdiction as at common law, except in the county of Pulaski, and where separate chancery courts have been established by law."

Plaintiff further alleges that in the circuit of which Benton county, Arkansas, is a part, a regular chancery court has been established by law.

Plaintiff further alleges that the above and foregoing provisions of the laws of Arkansas are the only provisions providing for the allowance of alimony to the wife in case of divorce granted to her.

Plaintiff further alleges that when said cause, so commenced in the chancery court of Benton county, Arkansas, was tried during the first days of March, 1911, and when the same was determined, and as a part of said finding and decree entered therein, it was ordered and decreed that defendant in that case should recover from the plaintiff therein, the said sum of \$2,500.00 of money borrowed, as

above mentioned, as found, and that she should be and was decreed as alimony one-third in value of said plaintiff's personal property, and the present value of her life interest in one-third of the value of said house and lot; and the court further found and decreed that said sum of \$2,500.00 borrowed money, the one-third in value of said personal property and the present value of the defendant's life interest in one-third of the value of said house and lot all together aggregated the sum of \$5,111.00 which sum was allotted and decreed to her, together with certain articles of furniture, which originally belonged to her.

This was the only allotment made to or for defendant in that suit, who is plaintiff herein, and said court of chancery was limited and prohibited from taking into the account in determining said amount of allowance to said defendant, the said lands lying and being in York county, Nebraska, or their value, and the only amount of alimony allowed said defendant was the sum of \$2,611.00, being the balance of said sum of \$5,111.00 left after deducting the sum of \$2,500.00 of borrowed money due defendant from said complainant as above alleged.

This plaintiff alleges that said lands situated in York county were owned by this defendant, who was complainant in the above mentioned suit, at the time said suit was commenced and at the time said decree of divorce was entered, and the said lands were well and reasonably worth \$150.00 per acre, and in the aggregate were worth at least \$48,000. And the amount of alimony so allotted and allowed to this plaintiff in that suit is largely insufficient and inadequate for the support of this plaintiff, and is not such fair proportion of the property of this defendant, owned by him at the date of said decree of divorce, as this plaintiff then was and still is entitled to in view of the circumstances surrounding this case, and the services and hardships endured and performed by this plaintiff for this defendant.

Wherefore this plaintiff prays that this court will take cognizance of this whole matter; that on a full and final hearing herein this court will grant, allow, adjudge and decree to this plaintiff a reasonable sum out of the value of defendant's property, located in York county, Nebraska, and above described, as and for alimony to which she is entitled, in addition to the said amount so allowed in and by the said court of chancery of Benton county, Arkansas;

and that this defendant be restrained and enjoined from transferring or otherwise disposing of said lands until said amount of additional alimony is fully paid; and this court will grant unto this plaintiff such other and further order, or decree as she may be entitled to in law or equity, and that she may recover such fair and reasonable sum from defendant as attorney's fees for her attorneys for their services as the court may find to be reasonable, to be taxed as costs, and that defendant be required to pay the costs herein and that execution may issue therefor.

GILBERT BROTHERS AND S. P. DAVIDSON,
Attorneys for Plaintiff.

State of Nebraska, }
ss.
Johnson County.

Lucie Bodie after being sworn in due form says she is the plaintiff in the above cause, that she has heard the foregoing amended petition read, and the allegations therein contained are true as she believes.

LUCIE BODIE.

Subscribed in my presence and sworn to before me this 20th day of November, 1911. My commission expires on the 23rd day of Aug. 1917.

N. M. DAVIDSON,
(Seal) *Notary Public.*

EXHIBIT "A."

In the Benton County Chancery Court.

Edward Bates, Plaintiff,

vs.

Lucie Bates, Defendant.

On this day (March 2nd, 1911), this cause came on to be heard upon the complaint of the plaintiff, the answer and cross-bill of the defendant and plaintiff's answer to said cross-bill and documentary and oral proof adduced, and said depositions taken in said cause. And the court after hearing the same and being well advised in the premises, doth dismiss plaintiff's bill for want of equity and doth grant a divorce on the cross-bill of defendant herein.

It is ordered, adjudged and decreed by the court that the defendant Lucie Bates, have and recover of and from the defendant Edward Bates, the sum of \$5,111.00 in full of alimony and all other demands set forth in the cross-bill, which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree herein rendered.

It is further ordered, adjudged and decreed by the court, that the defendant Lucie Bates, have the following personal property now in the residence of Edward Bates at Siloam Springs, Arkansas, that is to say, such silverware as has been purchased since the marriage of plaintiff and defendant; one sideboard and china cabinet, one chiffonier, one mattress, one-half of the quilts and comforts, one leather rocker, one wicker rocker, two bird eye maple chairs, one water tankard and such china as is her separate property.

It is further ordered and decreed by the court that a lien be declared on the following real estate in Benton county, Arkansas, owned by plaintiff, to secure payment of said judgment, lot 9, block No. 8, Beauchamp's addition to the city of Siloam Surings, Benton, Arkansas; and that defendant (plaintiff), place with the clerk of this court the following notes and mortgages herein above referred to. And as additional security that the plaintiff place with the clerk of this court, four notes of \$280.00 each, or a total of \$1,120.00; one note for \$89.60, one note for \$112.00, the same having been given by one Shookey to Edward Bates; one note for \$500.00, and two notes for \$40.00, given by Ida and W. S. Tibbs to Edward Bates; one note for \$400.00, given by Richard O. Forman to Edward Bates; one note for \$500.00, given by Norris and Yonkers, being a total of \$2,801.06, which are by the said Edward Bates in open court deposited with the said clerk, all of which notes are secured by mortgages.

It is understood and agreed that said Edward Bates may sell and dispose of any and all of said property, including real estate and notes, but upon the sale of same he is to deposit the proceeds arising from said sales with the clerk of this court until he had paid the sum of \$5,111.00, together with six per cent interest on the same up to the time of such payment.

It is further ordered and adjudged by the court that no execution issue on this judgment for six months from this

date and that such judgment bear interest at the rate of 6 per cent per annum from date until paid.

It is further ordered by the court that both plaintiff and defendant may withdraw all exhibits filed in said cause, and the plaintiff may withdraw the testimony given by him and taken in short hand by W. F. Chine, notary public.

The court finds from the evidence that defendant's maiden name was Lucie Bodie, and it is ordered and adjudged by the court that she be restored to her maiden name.

It is further ordered and adjudged by the court that plaintiff pay all costs in this suit laid out and expended.

It is further ordered and adjudged by the court that the bonds of matrimony entered into by and between plaintiff and defendant be dissolved, set aside and held for naught.

State of Arkansas, }
Benton County. } ss.

I, W. M. Heaslet, clerk of the chancery court, do hereby certify that the above and foregoing is a true and perfect copy of the judgment and decree entered in the above entitled cause March 2nd, 1911, as the same appears of record in chancery record "M," at page 596.

Witness my hand and seal of said court this 7th day of March, 1911.

W. M. HEASLET,

Clerk of the Chan. Court.

To the foregoing petition defendant filed his answer on the 15th day of August, 1914, which is in the words and figures following, to-wit:

In the District Court of York County, Nebraska.
Lucie Bodie, Plaintiff }
vs. } ANSWER
Edward Bates, Defendant }

Comes now the defendant Edward Bates, and for answer to the plaintiff's amended petition herein filed, admits that the plaintiff and defendant were married on or about the 1st day of January, 1889; admits that plaintiff obtained a divorce from this defendant by the consideration of the chancery court of Benton county, Arkansas, in 1911, a copy of which decree is attached to plaintiff's petition; admits that this defendant at the time of said

divorce proceedings, owned a house and lot in Benton county, Arkansas, of the value of about \$2500.00, and that he owned personal property of the value of about \$4000.00, as alleged in plaintiff's petition; admits that this defendant then held the legal title to 320 acres of land in York county, Nebraska, described in plaintiff's petition; and denies each and every other allegation set forth and alleged in plaintiff's petition, except as may hereinafter be expressly admitted or modified.

SECOND DEFENSE.

Defendant alleges that he now is, and all times since the 1st day of January, 1910, has been, a resident and citizen of the state of Arkansas, and at no time within the period above named was the defendant a resident or citizen of the state of Nebraska, nor was he domiciled at any time during said period in York county, Nebraska.

Defendant alleges that at all times between the 1st day of January, 1910, and the 2nd day of March, 1911, the plaintiff in this action was a resident and citizen of Arkansas and maintained a domicile in said state. Shortly after March 2, 1911, this plaintiff located her residence and domicile in Johnson county, state of Nebraska, and resided in said county at the time of the commencement of this suit. Neither at the time of the commencement of this suit nor at any time subsequent thereto was the plaintiff a resident of York county, Nebraska. At the time of the commencement of this suit plaintiff had been a resident of Nebraska for a period of less than six months. By reason of the facts above alleged, the district court of York county, Nebraska, was, and is, without jurisdiction to hear and determine the question of plaintiff's right to additional alimony, either under the statute governing the subject of divorce and alimony or of the general jurisdiction of the court.

THIRD DEFENSE.

This defendant shows to the court that the county of Benton is one of the duly organized counties of the state of Arkansas; that under the laws of the state of Arkansas a chancery court having general equity jurisdiction, as well as jurisdiction of the subject of divorce and alimony, convenes and sits at certain periods during the year in Benton county, Arkansas, and is known as the chancery court of Benton county, Arkansas.

On and prior to the 1st day of January, 1909, the plaintiff and defendant were each residents and citizens of Benton county, Arkansas. Prior to the month of June, 1910, they resided together as husband and wife. On or about the 14th day of June, 1910, this defendant, as plaintiff, filed his petition in the chancery court of Benton county, Arkansas, *versus* the plaintiff in this suit, in which this defendant sought to recover a divorce from the plaintiff in this suit; a copy of which petition is hereto attached and herewith filed and made a part of this answer, to the same extent and in the same manner as if fully set forth herein, and marked Exhibit "A." On or about the 29th day of June, 1910, the plaintiff in this suit, the defendant in the divorce proceedings instituted by this defendant in the chancery court of Benton county, Arkansas, filed her answer to the petition that had been filed by this defendant; and by way of cross-petition alleged facts which if found true, would have entitled her to a divorce from this defendant under the laws of the state of Arkansas. Among other things she alleged in her cross-petition as a basis for the recovery of alimony, that this defendant owned real and personal property of the reasonable and fair value of \$75,000.00, part of which consisted of 320 acres of land situated in York county, Nebraska, being the land described in plaintiff's petition, together with other property situated in Oklahoma and Arkansas; a copy of which answer and cross-petition is hereto attached and herewith filed and made a part of this answer and marked Exhibit "B."

On or about the 14th day of July, 1910, this defendant filed an answer in the chancery court of Benton county, Arkansas, to the cross-petition that had been filed by the plaintiff, defendant in that action. In his answer this defendant admitted that he owned certain property alleged in the cross-petition to be owned by him. He also admitted that the legal title to the property in York county, Nebraska, described in the cross-petition, stood in his name, but alleged that he held the legal title to one-half of said property in trust for the use and benefit of his two daughters and a son by his former marriage. A copy of said answer is hereto attached and herewith filed, and made a part of this answer, and marked Exhibit "C."

On or about the 14th day of July, 1910, this defendant, as plaintiff in the divorce proceeding in Benton county, Arkansas, filed an amended petition in said suit; a copy of which is hereto attached, and herewith filed and made a part of this answer and marked Exhibit "D."

On the 14th day of July, 1910, this plaintiff filed an answer to this defendant's amended petition in the chancery court of Benton county, Arkansas; a copy of which is hereto attached, herewith filed, made a part of this answer, and marked Exhibit "E."

On or about the 2nd day of March, 1911, the issues formed by the respective parties hereinbefore set forth by this defendant, as plaintiff, and by the plaintiff, as defendant, in the divorce proceedings instituted and pending in the chancery court of Benton county, Arkansas, were tried by that court. In the trial of said issues evidence was offered and received by the court touching the value of the property owned by this defendant, including the value of the land that stood in the name of this defendant, and situated in York county, Nebraska. Upon full consideration by the chancery court of Arkansas of the evidence and the issues in said divorce proceedings, in which said court took into consideration the value of the land that stood in the name of this defendant, in York county, Nebraska, in determining the amount of alimony that should be awarded to the defendant in that action; and on or about the 2nd day of March, 1911, entered its finding and decree on the issues made and the evidence adduced by the respective parties, in which the defendant in that action, plaintiff in this action, was awarded a decree of divorce against this defendant, and was awarded "the sum of \$5111.00, in full of alimony and all other demands set forth in the cross-bill" filed in said suit by the plaintiff in this suit. A copy of said decree is hereto attached, herewith filed, made a part of this answer, marked Exhibit "F."

On and between the 7th day of March, 1911, and the 11th day of April, 1911, this defendant fully paid the amount of alimony awarded to the plaintiff in this suit, including all costs in the chancery court of Benton county, Arkansas; which was duly received by the plaintiff and receipted for; that a copy of the docket entries showing said payment is hereto attached, herewith filed, and made a part of this answer, marked Exhibit "G."

No appeal has been taken from the finding and decree of the chancery court of Benton county, Arkansas, as herein alleged, and said decree remains in full force and effect except that the amount of alimony awarded therein has been fully paid by this defendant and received by the plaintiff.

This defendant alleges that the issues formed, heard and determined by the chancery court of Benton county, Arkansas, between the plaintiff and defendant in this suit, defendant and plaintiff in that suit, in which the chancery court of Benton county, Arkansas, in awarding to the plaintiff alimony, took into consideration all of the property owned by this defendant; which decree, so far as it relates to alimony having been fully satisfied, has become a full and complete bar to further proceedings on the part of the plaintiff in this suit, defendant in that, to recover additional alimony under the laws of the state of Arkansas.

Under the constitution of the United States the findings and decree of the chancery court of Benton county, Arkansas, as herein alleged and set forth, are entitled to full faith and credit in the courts of the state of Nebraska; and when full faith and credit is given to the findings and decree of Benton county, Arkansas, in this court, said findings and decree constitute a full and complete bar to the plaintiff's alleged right to recover additional alimony under the laws of the state of Nebraska.

Further answering, this defendant shows to the court that at the time of the marriage of the plaintiff and defendant, in the year 1889, the plaintiff was possessed of no property in her own right other than wearing apparel; and that at no time during said marriage did said plaintiff acquire property from any person other than this defendant; and this defendant specifically denies that he was indebted to the plaintiff for borrowed money at the time of the divorce proceedings in Benton county, Arkansas, as set forth in plaintiff's amended petition herein, and denies that the chancery court of said Benton county, Arkansas, found that he was indebted to plaintiff as set forth in plaintiff's petition herein.

And this defendant further alleges that the laws of the Arkansas court, in force at the time of said divorce pro-

ceedings provided (sec. 2684, Arkansas Statutes): "An order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other, during the marriage and in consideration or by reason thereof."

Wherefore this defendant prays: first, that it may be found and determined that the district court of York county, Nebraska, has no jurisdiction to entertain the application of the plaintiff for additional alimony; second, that under the full faith and credit clause of the constitution of the United States the findings and decree of the chancery court of Benton county, Arkansas, may be held to be a complete bar to the plaintiff's action in this case; third, that the defendant may be dismissed and recover his costs.

FIELD, RICKETTS & RICKETTS,
W. L. KIRKPATRICK,
Attorneys for Defendant.

(Here follows the verification in due form.)

The exhibits referred to in this answer are not printed and submitted herewith for the reason that the answer plainly states the issue presented, and the exhibits are simply intended to support the allegations contained in the answer.

The reply of plaintiff to this answer was filed in said district court of York county, Nebraska, on the 26th day of August, 1914, and is in the words and figures following, *to-wit*:

State of Nebraska, }
 York County, } ss.
 In the district court of said county.
 Lucie Bodie, Plaintiff, }
 vs. }
 Edward Bates, Defendant. }

And now comes said plaintiff, and for reply to the answer herein filed admits that these parties were married in said county of York in January, 1889, and that while both this plaintiff and defendant were living in, and were residents of Siloam Springs, in Benton county, Arkansas, this defendant, as plaintiff, or complainant

filed his bill commencing a suit for divorce from this plaintiff as respondent, in June, 1910; that afterwards, and on June 29th, 1910, this plaintiff as respondent in that suit, filed her answer and cross-bill, denying the allegations set out in said complaint, as grounds for divorce, and alleging acts of drunkenness, cruelty and unmanly and indignant conduct on the part of said complainant in that suit, as grounds for divorce for which she prayed, and for reasonable allowance as and for alimony, and means of support; that afterwards, and on July 14th said complainant, defendant herein, filed his amended bill of complaint against said respondent, this plaintiff, alleging various acts of misconduct on the part of this plaintiff, as respondent in that suit, for grounds for divorce to him from her; that afterwards, and on the 14th day of July, 1910, said complainant in that suit, this defendant filed his answer to said cross-bill of this plaintiff, filed as respondent in that suit, and thereafter and on the 2nd day of March, 1911, said suit was tried to the court of chancery of Benton county, Arkansas, in which said suit for divorce was commenced and pending, and decree entered therein, a copy of said decree is attached to and filed with plaintiff's petition herein, and this plaintiff denies each and every other allegation contained in defendant's answer herein.

This plaintiff specifically denies that said court of chancery of Benton county, Arkansas, either had jurisdiction to take the land belonging to defendant Edward Bates, lying and being in York county, Nebraska, into consideration in determining the amount to be allowed respondent in that suit, this plaintiff, or the value of said lands; and plaintiff further denies that said court of chancery did take into consideration in determining the amount of said allowance, said lands or their value, but on the contrary said court of chancery declined and refused to take said lands or their value into consideration in determining the amount of said allowance to said respondent in that suit, and said court of chancery held that it had no power or jurisdiction to consider said lands or their value in making said allowance, but held and adjudged that said court was limited by the statutes of Arkansas to the consideration of the property of complainant in that suit situated within the limits of the

state of Arkansas; and that the statutes of Arkansas provided that the only allowance that could be made by said court of chancery was fixed by said statutes as stated in the amended petition herein.

This plaintiff further replying alleges that in her cross-bill filed in said suit in the court of chancery she alleged that about the year 1902 she became the owner in her own right of \$3,000.00 in money, and shortly thereafter she loaned \$2,500.00 of the said sum to her husband, this defendant, taking his notes for the same bearing interest at the rate of 8 per cent per annum, and in her said cross-bill among other things, she prayed that her said husband be required to restore to her said \$2,500.00 so borrowed of her together with interest thereon at the rate of eight per cent per annum, and her husband, this defendant, in his answer to said cross-bill, among other things alleged that upon their first separation he gave his wife, this plaintiff, \$3,000.00, and when they patched up their differences and again resumed the relation of husband and wife, she returned \$2,500.00 of that sum to him, and his said wife never gave him, and he never came into possession of any other money or property acquired by his wife from any other source than himself.

Upon the issue thus presented to said court of chancery a hearing was had and it was by said court regularly and finally adjudicated in favor of this plaintiff, as respondent and cross-complainant in said suit, and it was then and there adjudicated that said complainant in that suit, this defendant was justly indebted to this plaintiff, who was cross-complainant in that suit, in the sum of \$2,500.00, and that he be required to pay her said sum as part of the allowance of \$5,111.00 adjudicated in favor of this plaintiff, as cross-complainant in that suit; and this defendant is now barred by said adjudication from raising any question as to how or from whom this plaintiff came to own said \$2,500.00 in her own right.

Wherefore this plaintiff prays that she may be granted the allowance and relief for which she has prayed in her amended petition herein, and that the prayer of defendant be denied.

GILBERT BROTHERS and S. P. DAVIDSON.
Attorneys for Plaintiff.

(Verified in the usual form.)

Upon the issues as thus presented a trial was had in the district court of York county, Nebraska, and on the 13th day of January, 1915, the findings and decree of that court was entered, in the words and figures following, to-wit:

FINDINGS AND DECREE.

State of Nebraska, }
ss.
York County. }

In the district court for said county.

Lucie Bodie, Plaintiff, }
vs.
Edward Bates, Defendant. }

And now on this 13th day of January, 1915, this cause having been tried and submitted to the court on a former day of this term of court, and taken under advisement by the court, and the court now being fully advised in the premises, finds for the plaintiff and against the defendant, and against the intervenors; and specifically finds that the intervenors Alberta Bates, Clement E. Bates and Josephine Bates, have no interest in this suit, and their petition of intervention does not contain or allege facts sufficient to entitle them to intervene herein, and their petition should be dismissed; the court further finds that the court of chancery of Benton county, Arkansas, did not have jurisdiction or authority to take into consideration in the divorce proceedings mentioned in the pleadings, the lands mentioned in the petition herein lying and being in York county, Nebraska, or their value in fixing the amount of allowance allotted to the respondent in said divorce proceedings in said court of chancery, and that said court of Chancery did not take said lands or their value nor their rental value into consideration in fixing said allowance; the court further finds that the value of said lands mentioned in the petition belonging to this defendant which are located in York county, Nebraska, was at the time said divorce proceedings or divorce suit was determined in said court of chancery, and it is at this time, forty thousand (\$40,000.00) dollars; and the court further finds that this plaintiff is entitled to additional alimony in the sum of ten thousand (\$10,000.00) dollars; but the marriage relation between

the plaintiff and defendant having been dissolved and the obligation of defendant to support plaintiff having ceased before the commencement of this action, plaintiff is not entitled to any allowance for attorney's fees. Defendant and each of said intervenors except to each of said findings and plaintiff excepts to the finding of the amount of alimony to be allowed as being too small and much less than should be allotted to her in view of the evidence herein, and also to the finding that she is not entitled to any allowance as and for attorney's fees.

It is therefore considered, adjudged and decreed that said intervenors take nothing by their petition of intervention and that their said petition be and the same is hereby dismissed and said intervenors except.

It is further considered, adjudged and decreed that plaintiff have and recover of and from said defendant the said sum of ten thousand (\$10,000.00) dollars, being the amount due her as alimony, together with the costs herein taxed at \$..... and that execution issue therefor; but it is further adjudged and decreed that plaintiff recover nothing for attorney's fees.

To the above findings and decree defendant and each of said intervenors except; and plaintiff excepts to the allowance of said amount as alimony, as being too small and less than she should have been allowed under the evidence in this case, and she prays and is allowed an appeal thereon and also upon the denial of any allowance for attorney's fees, and plaintiff is allowed forty days from the rising of the court to prepare and serve her bill of exceptions; and defendant and each of said intervenors are allowed forty days from the rising of the court to prepare and serve their respective bills of exception.

E. E. GOOD,
Judge.

From the foregoing decree defendant prosecuted an appeal to the supreme court of Nebraska. On or about September 20, 1915, this cause was argued and submitted in the supreme court of Nebraska, and taken under advisement. On the 15th day of January, 1916, the cause was decided in and by said

supreme court, and it was adjudged therein that the above decree of the district court for York county, Nebraska, be, and the same was in all things affirmed. The opinions of the majority of the supreme court of Nebraska, affirming said decree, are somewhat lengthy, but they ably and fully discuss and settle each of the issues presented, in favor of the plaintiff in the cause, who is defendant in error here.

These opinions are as follows:

FAWCETT, J. On the first trial of this cause in the district court for York county a general demurrer to the petition was sustained and plaintiff appealed to this court. We found that the petition stated a cause of action and the judgment was reversed and the cause remanded for trial. 95 Neb. 757, 146 N. W. 1002.

The trial in the district court after the case was remanded resulted in a decree in favor of the plaintiff for \$10,000.00 alimony. Defendant appeals.

(1). Our former opinion contains quite a full recital of the troubles of the plaintiff and defendant, while husband and wife, and a sufficient statement of the issues involved in this suit. The parties were divorced March 2nd, 1911, in the court of chancery in Benton county, Arkansas, and plaintiff by decree in that case was restored to her maiden name of Bodie which accounts for the difference in the names of the parties in the present suit. As reference will be frequently made in this opinion to the parties as they appear in the Arkansas suit, and as they appear in the present suit, we will for the purpose of avoiding any confusion as to the parties, refer to the plaintiff in this suit, who was the defendant in the Arkansas court as "Bodie," and to her former husband, defendant in this suit, as "Bates."

In the Arkansas suit Bates instituted the suit for divorce, alleging infidelity and other misconduct. Bodie denied the allegations of the petition and prayed for a decree of divorce in her favor. She alleged the property of Bates in Arkansas and also alleged that he is the owner of real estate in Nebraska of the value of \$48,000.00, and prayed judgment and alimony. Bates and his counsel there contended on the trial of that suit that under the law of Arkansas that court in fixing the

amount of alimony could not take into consideration the Nebraska land and allow the wife alimony on account of the value of such land. This contention was sound. The rule is settled in Arkansas that:

"In divorce cases the court of equity must look to and be governed by the statute, and can not exercise inherent chancery powers not provided by statute."

Ex Parte Helmert, 103 Ark. 571, 147 S. W. 1143.

"Where by statute jurisdiction over particular subjects of equity is conferred, or given to common law courts, the entire body of law administered in courts of equity of this country attaches, but the subject of divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction; and in such cases the courts have no other powers than those expressly conferred by statute."

Bouman v. Worthington, 24 Ark. 522.

See also *Thomas v. Thomas*, 27 Okl. 784, 109 Pac. 825; 113 Pac. 1058; 35 L. R. A. (N. S.) 124, 133 Ann. Cas. 1912e, 713.

In our former opinion we determined that (95 Neb. 762, 146 N. W. 1002):

"An examination of the Arkansas statute above set out shows that in that state no provision is made authorizing a money judgment as alimony. The law expressly declares just what interest the wife shall take in both the real and personal property of her husband, where she is granted a divorce. As to the real estate the provision is that she shall be entitled to one-third of all lands of which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form. It will not, of course, be contended by any one that under that statute the Arkansas court could have vested in Mrs. Bates for life, one-third of the lands of which her husband was then seized located in Nebraska. That provision unquestionably refers to lands situated within the jurisdiction of the court."

We also decided that (95 Neb. 763, 146 N. W. 1002):

"It is clear therefore that as to the Nebraska lands the rights of the parties were not adjudicated in that action."

(2, 3). There is some contention now that our former decision as to the effect of the Arkansas statute, and as to the fact that the Arkansas court did not allow alimony on the York county land should not be considered as the law of the case because of the evidence which was introduced upon the trial from which this appeal is taken. The Arkansas statute referred to in the opinion so far as it is pleaded and proven in this case, reads as follows:

"And where the divorce is granted to the wife, the court shall make and order that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property, absolutely, and one-third of all lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been relinquished by her in legal form." (Kirby's Digest, sec. 2684.)

The records now show that there is a prior section of the statutes of Arkansas which provides:

"When a decree shall be entered, the court shall make such order touching the alimony of the wife, and care of the children if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." (Kirby's Digest, sec. 2681.)

Can these two sections of the statute be construed together or must they be distinguished and construed to apply to different conditions or situations? That they can not be construed together is apparent upon their face, for they are directly contradictory. The statute first above quoted, which prescribes specifically what shall be allowed to the wife as alimony when she is "so granted a divorce against the husband," is a later statute than section 2681 above quoted. Section 83, p. 936, 1 R. C. L. shows very clearly why section 2681 was enacted by the Arkansas legislature, viz:

"According to the rule of the common law, where the divorce was granted for the misconduct of the wife, she was not entitled to alimony. This was productive of so much hardship, however, and so frequently left her a

prey to starvation or a life of shame, especially where her own property had become vested in her husband by reason of the marriage, that statutes have been enacted in England and a number of the United States authorizing the courts to make such an allowance of alimony in favor of a guilty wife, as the surrounding circumstances may justify."

Two of the states cited in this text are Arkansas and Oklahoma. In *Ecker v. Ecker*, 22 Okl. 873, 98 Pac. 918, 20 L. R. A. (N. S.) 421, we have a discussion of this identical section, viz:

"The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony; but in a number of states including the state of Arkansas, from which state the statutes in force in the Indian territory were adopted, the common law has been modified by statute. The statute governing this case reads: (The section of the statute quoted in the opinion is a verbatim copy of section 2681, Kirby's digest, under consideration in this case). Under the language of this statute, or similar language of statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife, is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case (citing cases). It is, however, a discretion that a court should at all times exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances. In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife, intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce."

The trial court ordered an equal division of the property or that defendant have judgment for one-half of the value of the same. This judgment was held erroneous, the holding being based upon section 2568 Mansf. Dig., enough of which is set out to show that the section is a duplicate of section 2684 in this case. In *Pryor v. Pryor*, 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102, it is said:

"The first question presented is, whether or not the chancery court had jurisdiction to decree an allowance of alimony to a guilty wife against whom a decree of divorce was granted."

The court then quotes from 2 Nelson, *Divorce and Separation*, sec. 907, where the question of the allowance of alimony to a wife, when the husband has obtained a divorce, is discussed along the same lines as in 1 R. C. L., above cited. The court then says:

"A statute of this state provides that," (the court here quotes section 2681 Kirby's Digest, and then adds): "Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife."

The above authorities clearly show just what the legislature intended when it enacted section 2681, viz: that this section was enacted in order to permit the chancery courts of the state to award alimony to the wife, in cases where the divorce was obtained at the suit of the husband on account of her misconduct. In such cases the legislature very properly left it to the court to make "such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." But when, later on, the legislature considers the question as to what a wife shall be entitled to receive when a divorce is granted to her against her husband for his wrong doing, they enacted section 2684 above quoted. Otherwise, why do they use the language, "where the divorce is granted to the wife," and the further expression, "and the wife so granted a divorce against the husband shall be entitled," etc. It is clear that the purpose of the legislature was that the amount which the wife should receive in such a case, should not be en-

shrouded in any uncertainty by leaving it to the discretion of the court to say what should be a reasonable allowance to her, but fixed the amount, definitely, as to both the real and personal estate.

There is nothing ambiguous in this section of the statute. Its terms are too plain to be misunderstood. It is clear therefore that the allegation in the petition in this suit that section 2684 of Kirby's Digest, was the only statute in force in Arkansas, at the time of the trial of the suit there, which provided for the allowance of alimony in a case where the divorce was granted to the wife as against the husband, is a correct statement of the law. Section 2681 has no application whatever to such a case. In this manner and no other can effect be given to each of the two statutes under consideration. It will be seen that the allowance of alimony to the wife, when a divorce is granted for her fault, rests upon an entirely different basis than when a divorce is granted in her favor, and it is common in the United States, as above shown, to make that distinction by statute. There can be no doubt therefore, that the general rule that a specific statute on a given subject will control as against a general statute that might include the same subject in the absence of a specific statute, applies here, and that the statute quoted in our former opinion, being section 2684, controls the courts of Arkansas in all cases where a divorce is granted in favor of the wife. In such case the court is required to divide the personal property, to give her one-third thereof, "absolutely" and to give her a life estate of one-third of the husband's lands.

The Arkansas court could not secure to the wife the use of real estate outside of the jurisdiction of the court. In *Wood v. Wood*, 59 Ark. 441, 452, 27 S. W. 641, 644, it is said:

"Appellant did not undertake to show in her original or amended petition for divorce, that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in her original bill that the defendant was not worth less than \$200,000.00, but did not say in what his estate consisted, or that it was within the jurisdiction of

the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state. Nothing appears in the record outside of the evidence to show that the court committed an error of law in failing to divide the estate of the husband in accordance with the act."

(4). We are unable to read that language of the court and reach any other conclusion than that the law of Arkansas limits the jurisdiction of a court of chancery in fixing alimony in a divorce case to property within the jurisdiction of the court. There was then just ground for the contention in the Arkansas court, that the court had no jurisdiction to allow the wife alimony on account of the real estate of the husband in Nebraska. Was such a contention made? It is conceded and the record before us clearly shows that defendant did, with the help of able counsel strenuously contend in the Arkansas court that that court could not in that case allow alimony to Bodie on account of the Nebraska lands. And the record shows that the court did not in fact make any allowance on account of the Nebraska lands. It is shown by the overwhelming weight of the evidence before us that the Arkansas court allowed Bodie \$5,111.00 "in full of alimony and all other demands set forth in the cross-bills." The only demand set forth in the cross-bill, outside of alimony, was the restoration of her \$2,500.00 which she had loaned to Bates when they were living together as husband and wife. Deduct this sum from \$5,111.00 and it will be seen that the total amount allowed for alimony was \$2,611.00. Under the admissions of Bates and the uncontradicted evidence, he, at the time of the divorce trial, owned personal property and notes and mortgages within the jurisdiction of the Arkansas court amounting in the aggregate to \$7,000.00 and a house and lot also within the jurisdiction of the court, worth \$2,500.00. Under the statute Bodie was entitled "absolutely" to one-third of the \$7,000.00 of personal property, or \$2,333.33. She was also entitled to the present value of one-third interest for life in the house and lot. If we figure that life interest at only \$278.00 it would make her statutory interest in the property of Bates situated in Arkansas, \$2,611.00 be-

ing the sum allowed as alimony by that court. Hence it is idle to say that the chancellor considered the Nebraska land in fixing the amount of alimony. If he "considered" it, he considered it only to the extent of determining that he had no jurisdiction to take it into account in fixing the amount of alimony. It would be a travesty not only upon the law but upon the commonest principles of justice for us to hold that the chancellor when he decided the divorce case and allowed Bodie \$2,611.00 of alimony, took into consideration personal property worth \$7,000.00 and real estate of the value of \$2,500.00 located within the jurisdiction of his court, and also took into consideration the value of real estate in this state which the decree before us finds was worth \$40,000.00 at the time the chancellor in Arkansas tried that case. If, in addition to the property within his jurisdiction, he had also taken into account the present value of an estate for life in one-third of land in Nebraska worth \$40,000.00 the amount which he would have been compelled to allow would have far exceeded the value of all the property which Bates owned in Arkansas at that time. If he took into consideration the land in Nebraska he was bound to consider it in the light of the law of Arkansas, which would require him to allow her a life estate of one-third interest in the Nebraska lands. He allowed her all told \$2,611.00. Further comment is unnecessary. *Res ipsa Loquiter.* From what has just been said, it will be seen that defendant succeeded in the Arkansas court, in his contention, that that court was without jurisdiction and prevented any allowance on account of the Nebraska land. He now, in this case, says that his contentions there were unwarranted, that the court did have jurisdiction and by these inconsistent positions he insists that he has defeated the just claims of his wife. This, of course, he can not be allowed to do. In *Cross v. Levy*, 57 Miss. 634, it was held that a party who had agreed that a justice of the peace had jurisdiction of a case, could not afterwards, as against the same party, contend that the justice did not have such jurisdiction. In *Long v. Lockman*, (D. C.) 135, Fed. 197, it was held that a party who, in a suit in the district court of the Arkansas district had alleged that the district court of the Colorado district had exclusive jurisdiction of the case, and upon that contention had procured the case to be

dismissed by the court of the Arkansas district, could not afterwards, be heard to contend against the same party that the court of the Colorado district was without jurisdiction when sued in that district. The court said:

"In my opinion, Williams in his lifetime was, and the administrator now is, estopped from denying that his residence was in Colorado when the petition herein was filed. * * * Every element of estoppel is in the evidence, and the evidence on that question is not in conflict. Williams under oath said his residence was in Colorado. He received the advantage from that oath. The petitioning creditors acted on it. They filed their petition here. They have incurred much expense by reason of that oath. It can not now be controverted. * * * I pass those questions by, and hold that this court has jurisdiction upon the grounds of estoppel. And that filing pleadings, offering evidence, making objections, obtaining rulings, and so forth, in one case, may be an estoppel in another case, see the following" (citing many cases).

A party is estopped to deny facts pleaded to defeat jurisdiction of court. *Caldwell v. Morris*, 120 La. 879, 45 South. 927, 15 L. R. A. (N. S.) 423, 124 Am. St. Rep. 446, 14 Ann. Cas. 1043, and cases cited in note. He can not in one litigation insist that the court has no jurisdiction of specified property, and succeed in that contention, and afterwards, in another litigation, with the same parties insist that the court did have jurisdiction of that particular property, and should have adjudicated it in the former action and so defeat any adjudication thereof, entirely.

Is the judgment in the Arkansas court *res judicata*? *Thomas v. Thomas*, 27 Okl. 784, 109 Pac. 825; 113 Pac. 1058, 35 L. R. A. (N. S.) 124; 133 Ann. Cas. 1912C, 713, construing an exactly similar statute, cites *Bowman v. Worthington*, *supra.*, and quotes with approval, the holding in that case above set out, and adds:

"The trial court not possessing jurisdiction to entertain the question of the disposition of this property, in the divorce proceeding, the same did not become *res adjudicata* by reason of that action, and hence is left open for adjudication in this action."

Matson v. Poncin, 152 Iowa, 569, 132 N. W. 980, 38 L. R. A. (N. S.) 1020, holds:

"A judgment to be available as an estoppel, must have decided the particular matter involved in the later suit; it is not sufficient that the same question may have been determined."

In Herman on Estoppel and Res Adjudicata, sec. 252, it is said:

"The rule that estoppels must be certain to every intent, and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and for this reason the record of a judgment must show with some degree of certainty, the precise points determined, and not from inference or argument; and, where it gives no indications at all as to what particular matters were adjudicated, it leaves the question unsettled, and is not available either as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision can not be extended by argument or implication to matters which were not determined. An estoppel by judgment is never inferred unless the basis on which it rests is such as to lead to the conclusion that the whole subject was litigated and adjudicated."

See also Wells, Res Adjudicata, sec. 223.

In *Packet Co. v. Sickels*, 72 U. S. (5 Wall.) 580, 592, it is said:

"As we understand the rule in respect to the conclusiveness of the verdict in a former trial between the same parties, when the judgment is used in pleading an estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined —that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties, and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its

consideration and determination, it will not be concluded."

(5). In *Russell v. Place*, 94 U. S. 606, the court, speaking through Mr. Justice Field, said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record —as for example, if it appear that several distinct matters have been litigated, upon one or more of which, the judgment may have passed, without indicating which of them was thus litigated and upon which the judgment was rendered, the whole matter of the action will be at large, and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In *Mercer v. The City of Omaha*, 76 Neb. 289, 107 N. W. 565, the first paragraph of the syllabus, holds:

"The rule is well settled, both in this state and elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it is rendered."

(6, 8). Finally we cite *Slater v. Skirring*, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444. The opinion in this case was by commissioner Irvine. It shows a very careful consideration by that talented commissioner, of a plea of *res adjudicata*. Beginning on the fourth line from the bottom of page 112 of 51 Neb., it is said:

"The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to appear, not only that there was a substantial identity of issues, but that the

issue as to which the estoppel is pleaded was in the former action actually determined; and, where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit (citing cases), and we think that while the authorities are conflicting their greater weight is in favor of the view that the burden of the proof is upon the party pleading the estoppel, to establish the fact of the adjudication by extrinsic evidence, if necessary, and not upon the other party to show that an issue which might have been adjudicated, was not."

Slater v. Skirring cast the burden in this case upon the defendant to sustain his plea by establishing the fact of the actual determination, in the former trial, of the issues involved here and under the other authorities cited, that proof must be clear to the extent of leaving no room for doubt.

Judge Humphreys, who presided at the trial of the case in Arkansas was called as a witness in this case. He was interrogated as to whether he took into consideration any ownership or equity of Bates in the land in Nebraska. His answer was: "I think I did; it was my intention to cover the whole case." He stated that he was testifying to his best recollection, but a reading of his entire testimony will show that his recollection was not any too clear. Bates, himself and Mr. Walker, his attorney, at the Arkansas trial, both testified that the chancellor took the Nebraska land into consideration in determining the amount which should be allowed Bodie as alimony. This testimony is controverted by the testimony of Mr. Lindsay, Mr. Shannon, Judge McGill and Judge Davidson, all of whom were present and participating in the trial as counsel for Bodie at the time the chancellor rendered his decision and by Mr. Heaslet, clerk of the court of chancery in which the case was tried. These five witnesses all testified clearly and explicitly that the chancellor announced from the bench, at the time he decided the case, that he did not have jurisdiction over the Nebraska land and could not consider the same. The four lawyers representing Bodie, are gentlemen of high standing in the profession of the law, and with the exception of Judge Davidson, have no interest in the

litigation. Mr. Heaslet was clerk of the court, and his testimony stamps him as a candid and truthful gentleman. There is nothing to show that he is in any manner interested in either of the parties to the suit, and it can not be supposed that he would have any motive in giving testimony about a transaction in the court of which he was clerk, at variance with that given by his presiding judge. When you add to the testimony of these five witnesses, the fact that the court could not have taken the Nebraska land into consideration in making his allowance, as hereinbefore shown, the district court before which the suit at bar was tried, could not have done otherwise than to credit the testimony of the five witnesses, by the facts so clearly shown and discredit the testimony of the three witnesses to the contrary. Under the evidence above set out and the authorities cited, it is clear that the record now before us sustains the allegations in the petition which our former judgment held stated a good cause of action and fully sustains every point decided in our former opinion. There is therefore no reason why that opinion should be departed from or in any way modified.

(9, 10). It is urged that the failure of Bodie to prosecute an appeal from the decree of the Arkansas court, is a bar to the present suit. For the reasons above stated, this contention is without merit. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony, and having refused so to do, its judgment was right, and an appeal would have been unavailing. There was nothing to appeal from. Nor is there any merit in the contention that the decree in this case does not give full faith and credit to the judgment of a sister state.

(11). On the trial of this case the trial court followed our former decision. He was fully justified under the evidence in doing so, and we can not without violating every principle of law and justice, reverse his judgment. If he erred at all it was in not allowing Bodie more than \$10,000.00.

The judgment of the district court in dismissing the petition of intervention of the intervenors is so clearly right that we shall not spend time in discussing it.

The motion of the plaintiff for an allowance of attorney's fees is overruled. The judgment of the district court is in all respects affirmed, Sedgwick, J., concurring. No one denies that there was at least serious doubt as to the jurisdiction of the Arkansas court to give the wife anything on account of the Nebraska land. Their statutes expressly provided that when the wife obtained the divorce the court should give her one-third of the personal property and the use of one-third of the husband's real estate during her life. The court could not give her the use of real estate that was not within the jurisdiction of the court. That proposition was contested vigorously before the Arkansas court, the husband contending earnestly by his attorneys that the court could not give her anything on account of foreign land, and the court, as is demonstrated from the record, did not give her anything.

It appears conclusively from the record that the Arkansas court allowed her the money which she had loaned to the defendant, and the one-third of his personal property, there in Arkansas, and the value of her life interest in the real estate that he had there. These items added together make the exact amount that the court allowed her, so that the record speaks for itself that the Arkansas court did not, as a matter of fact, give her anything on account of the York county land. In *Cizek v. Cizek*, 76 Neb. 797, 107 N. W. 1012, it was decided that:

"Under section 27, chapter 25, Compiled Statutes 1913, the district court has a continuing power, after a decree of divorce, and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties."

In the opinion the court said:

"In the case at bar a good and sufficient reason is shown why the former decree for alimony should be modified. * * * Having demonstrated that the attempted adjudication of the court upon the question of alimony was nugatory and of no effect, he can not now be heard to urge it as a final adjudication of the matter."

So in this case the defendant on this trial insisted that the court could not give plaintiff anything on account of the Nebraska land. The court did not give her anything.

"He can not now be heard to urge it as a final adjudication of the matter."

The syllabus in this case was prepared by the court. And we hereto attach the paragraphs thereof which we think may aid this court in deciding this motion to dismiss the writ of error:

SYLLABUS OF CASE.

1. In the state of Arkansas divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction. In such cases the courts of that state have no other powers than those expressly conferred by statute. *Bowman vs. Worthington*, 24 Ark. 522 (In re Helmert, 103 Ark. 571).

2. Sections 2681 and 2684, Kirby's Digest of the Statutes of Arkansas, set out in the opinion, examined, and *held*, that section 2681 applies to cases where a husband obtains a decree of divorce against his wife, and section 2684 to cases where the decree is granted to the wife against her husband.

3. Section 2684, Kirby's Digest of the Statutes of Arkansas, examined, and *held*, to expressly determine just what interest a wife shall take in both real and personal property of her husband where she is granted a divorce, and that under that statute the Arkansas court could not have vested in the plaintiff in this suit, who was defendant there, an interest for life or other interest, in the land of which her husband was then seized, located in Nebraska.

4. The pleadings and decree of the court of chancery in Arkansas examined, and *held*, to have allowed plaintiff, as alimony, the sum of \$2,611.00 and no more, and that such sum was the amount which she was entitled to receive out of the estate of defendant, located in the state of Arkansas.

7. The evidence in the record, taken in connection with the pleadings and decree in the court of chancery of Arkansas, and the then value of the real estate owned by the defendant in the state of Nebraska, *held*, to conclusively show that the court of chancery in Arkansas did not take the Nebraska land into account in fixing the amount of alimony allowed this plaintiff.

8. A party can not in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards, in another litigation with the same party, insist that the court did have jurisdiction of that particular property and should have adjudicated in the former action contrary to his contention then made, and so defeat an adjudication thereof entirely.

9. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony allowed plaintiff, and having for that reason refused to do so, its judgment was right, and an appeal therefrom would have been unavailing.

10. The contention that the decree in this case does not give full faith and credit to the judgment of a sister state, is without merit.

11. The opinion on the former hearing of this case, 95 Neb. 757, 146 N. W. 1002, in so far as applicable to the facts now appearing in the record, is adhered to as the law of the case.

ARGUMENT IN SUPPORT OF THIS MOTION.

This being a suit to recover an allowance for additional alimony, brought by a former wife against her former husband, it is a suit within the exclusive jurisdiction and control of the state court. This court, speaking through Mr. Justice Wayne, in an early case, said:

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or of one from bed and board."

Barber v. Barber, 21 Howard (U. S.) 584.

In a later case Mr. Justice Gray, speaking for this court, after quoting the language above quoted from *Barber v. Barber*, said:

"It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction either of suits for divorce, or claims for alimony, whether made in a suit for divorce, or by an original proceeding

in equity, before a decree for such alimony in a state court. Within the states of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state, and not to the laws of the United States."

Simms v. Simms, 175 U. S. 167.

See also:

Bowman v. Bowman, 30 Fed. Rep. 849.

But it seems that counsel for plaintiff in error contend that by the proceedings and decree here "full faith and credit" has been denied to the decree of the court of chancery in Arkansas in which the decree of divorce was granted. Their claim that this court has jurisdiction, upon this proceeding in error, to re-examine and reverse the judgment herein, is based upon that contention. But we contend on behalf of the defendant in error that the mere statement in the assignment of errors, or even in the answer, that "full faith and credit" has been denied to the decree of said court of chancery, standing alone does not, and is not sufficient to, put that question in issue.

We contend that as the petition on its face, and the opinion and judgment of the supreme court of Nebraska, both show that "full faith and credit" has been given to the decree of the Arkansas court, and that there is no merit in the contention that such "full faith and credit" has been denied herein, then the mere statement of plaintiff in error in his assignment of errors and in his answer that "full faith and credit" has been denied to the decree of the Arkansas court, is not sufficient to raise that question in this case.

An examination of the petition upon which this case was tried in the district court of York county, Nebraska, shows that the proceedings and decree of the chancery court of Arkansas is fully set out, and no contention is made, and no allegation is contained therein in any way denying the validity and correctness or justice of that decree. The simple allegation is made that by reason of the peculiar statute of Arkansas which governs and controls the courts of that state in fixing the allowance of alimony to a wife, *in all cases* in which

the divorce is granted on her petition, said court of chancery was limited and controlled by that statute, and had no jurisdiction to take the Nebraska lands of this plaintiff in error into consideration in fixing the amount of allowance to this defendant in error, and as a matter of fact did not do so. The learned and very well-reasoned opinion of Fawcett, J., speaking for the majority of the supreme court of Nebraska, in this case, above quoted for the convenience of this court, very clearly shows that the decree of the court of chancery of Arkansas was right, and that no appeal therefrom would have been availing, but that that court was limited and prohibited, by the particular statute pleaded by this defendant in error, from taking the Nebraska lands into consideration in determining and fixing the allowance of alimony to her. This being true, the supreme court of Nebraska, both in the opinion of Justice Fawcett and in paragraph 10 of the syllabus prepared by the court, holds that "the contention that the decree in this case does not give 'full faith and credit' to the judgment of a sister state, is without merit."

The opinion of Mr. Justice Fawcett, above referred to, is ably supported by the brief but plain and expressive language of Mr. Justice Sedgwick in his concurring opinion above quoted.

By the "full faith and credit" clause of the national constitution and the act of congress passed to carry it into effect, it was incumbent upon the Nebraska court to give the decree of the chancery court of Arkansas the same faith and credit it had by law or usage in the courts of Arkansas.

Roller v. Murray, 231 U. S. 745.

That the court of chancery of Arkansas was limited and controlled by the statute of Arkansas pleaded in this case, section 2684, is clearly shown by the holding of the supreme court of Arkansas, construing this very section of the Arkansas statutes.

In a case involving the construction of this very section of the Arkansas statutes the supreme court of Arkansas has declared:

"As to the question of alimony, that is fixed by statute. See sec. 2517, Sand. & H. Digest. The legislature seems to have enacted that statute for the purpose of putting an end to all controversies as to dower rights, and to settle the matter when a divorce is granted dissolving the marital bonds. Hence, the allowance to a divorced wife, who is entitled at all, is exactly or substantially the same as would be her dower interest in case of the death of her husband. * * * The court therefore erred in decreeing her only one-third of the remainder of his estate after deducting the amount of his debts, and should have allotted to her one-third of the value of his personal property, absolutely, without taking his debts into consideration, and should have given her one-third of his realty for her natural life, and ordered otherwise as the statutes require."

Beene v. Beene, 64 Ark. 522.

In a later case the supreme court of Arkansas reaffirms the holding in the case just cited, and among other things said:

"This court has construed this statute to give the divorced wife, for and during her natural life, such interest and amount of his real estate as would be her dower in case of the husband's death. * * * This statute provides that the property to which the wife is entitled, shall be designated in the decree of divorce, and that it may be asserted that *the statute of its own force vested in the wife an interest in the husband's property* which she could have asserted, and set apart at the time the decree of divorce was entered."

Hix v. Sun Insurance Co., 94 Ark. 487, 488.

It is proved by the testimony of the chancellor before whom the case for divorce was tried in Arkansas, that section 2517 of Sandall & Hill's Digest is the the same section as that numbered 2684 in Kirby's Digest, which is pleaded by defendant in error in this case.

So we contend that the decree of the court of chancery of Arkansas, in the original divorce case, gave to this defendant in error such part of her husband's property within the jurisdiction of that court, and within the control of the law of

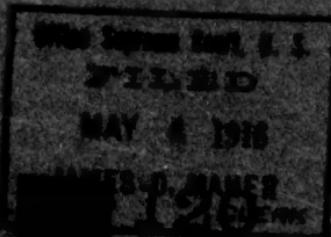
Arkansas as she was entitled to. To holding of the supreme court of Nebraska, in the opinions above quoted, is that the holding of the court of chancery in the divorce suit was right, and gave the defendant in error in this case all of the husband's property within its jurisdiction that it could give her under the statutes of Arkansas, and an appeal therefrom would have been unavailing. This being so, certainly the same "full faith and credit" has been given to that decree, in this case, that it is entitled to "by law or usage in the courts of Arkansas."

We contend, therefore, that plaintiff in error's claim that "full faith and credit" has been denied in this case, and by the judgment appealed from to the decree entered in the divorce case in the court of chancery of Arkansas, is not supported by sufficient facts to justify extended argument. We ask that this writ of error be dismissed, or that the judgment of the supreme court of Nebraska herein be affirmed.

Respectfully submitted,

SAMUEL P. DAVIDSON,

Attorney for Defendant in Error.



ON THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1915.

EDWARD BATES, PLAINTIFF IN ERROR,

vs.

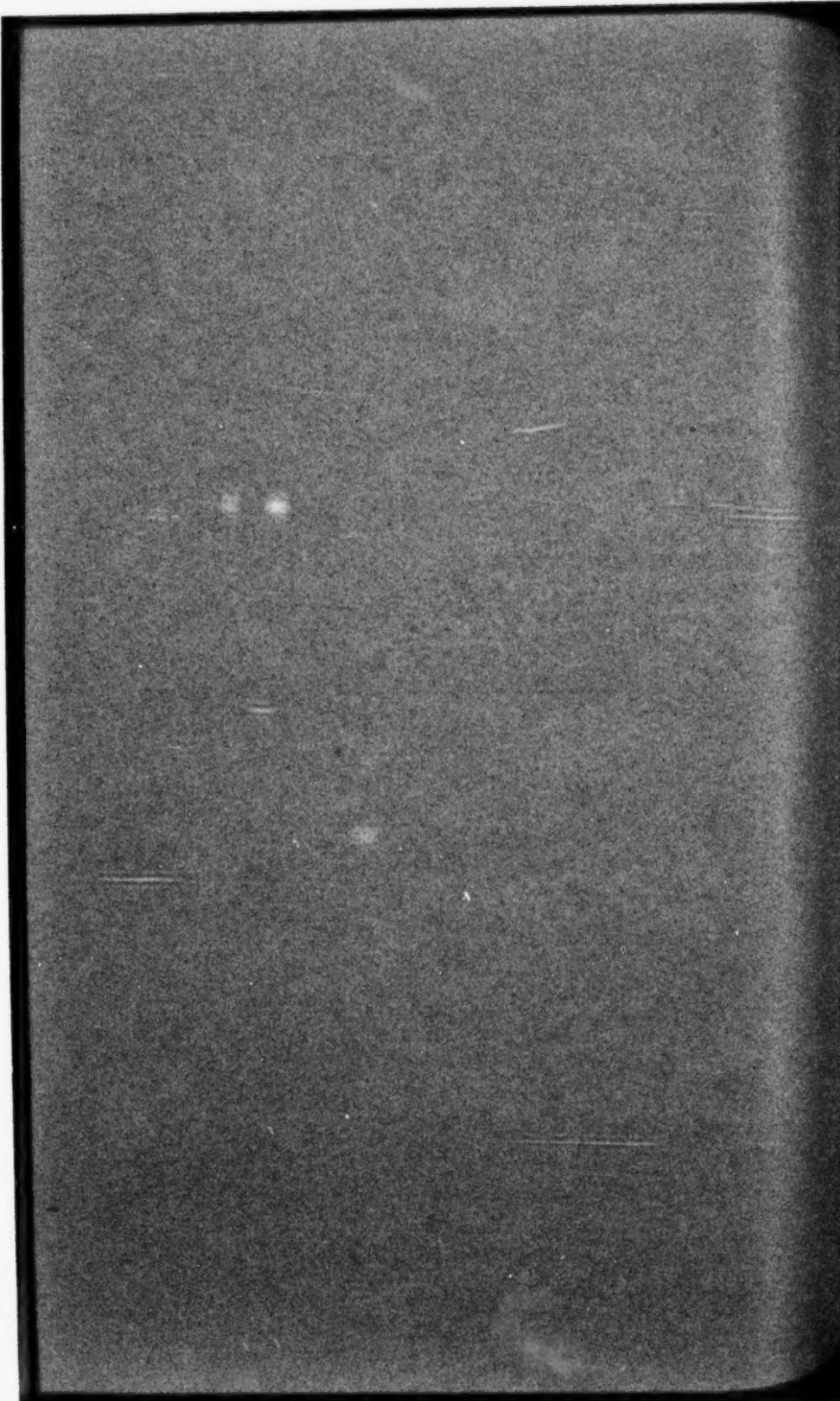
LUCILLE BODIE, DEFENDANT IN ERROR.

REASON TO THE ATTENDING COURT IN THE STATE OF NEW YORK

CLERK OF THE DISTRICT COURT OF NEW YORK, 20
EDWARD BATES, PLAINTIFF IN ERROR

Plaintiff in Error, Edward Bates, of New York, New York, is a citizen of the United States.

Plaintiff in Error, Edward Bates, of New York, New York, is a citizen of the United States.

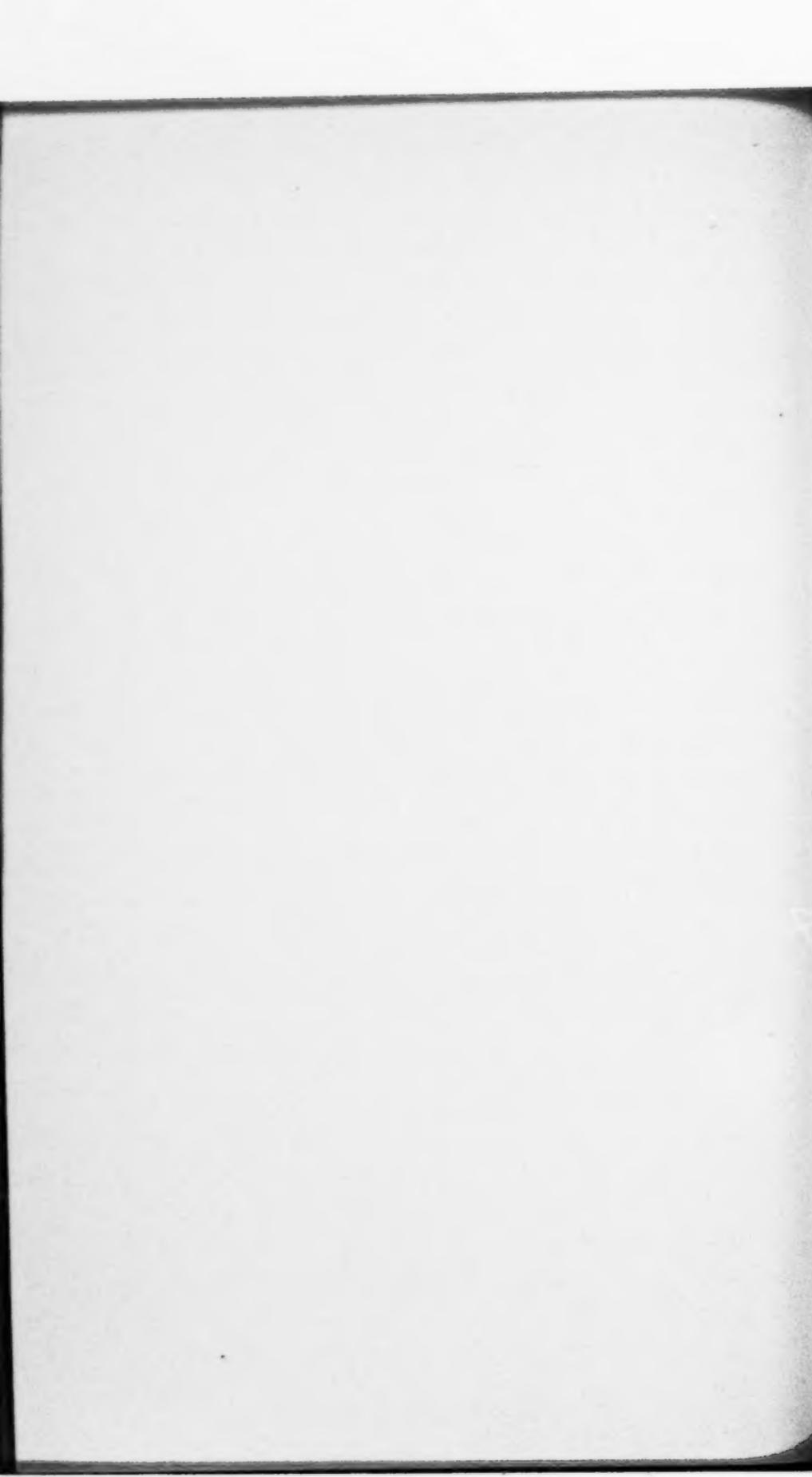


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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1915.

EDWARD BATES, PLAINTIFF IN ERROR,
VS.

LUCIE BODIE, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

**BRIEF OF PLAINTIFF IN ERROR RESISTING MOTION TO
DISMISS FOR WANT OF JURISDICTION.**

FIELD, RICKETTS & RICKETTS and W. L. KIRKPATRICK,
Attorneys for Plaintiff in Error.

SAMUEL P. DAVIDSON, *Attorney for Defendant in Error.*

ADDITIONAL PARTS OF THE RECORD.

We print in this connection some additional parts of the record to show the issue on the question of alimony in the Arkansas divorce suit; that the issue was litigated and determined by the court; that the judgment we seek to reverse was by a divided court of four for, to three against, the dissenting members Barnes J. and Letton J., concurring in an adverse opinion by Rose, J.; also to show that the question presented for the consideration of this court is not additional alimony, but the force and effect due to the Arkansas judgment plead in bar under the full faith and credit clause of the Constitution.

Answer and cross petition of Lucie Bates (Bodie) in the Chancery Court of Arkansas, comprising Exhibit "B" of Bates' answer, but omitted from the printed copy in defendant in error's brief.

EXHIBIT "B"

In the Chancery Court of Benton Co. Ark.

July Term, 1910.

Edward Bates, Plaintiff,

vs.

Lucie Bates, Defendant.

Comes the defendant, Lucie Bates, and for her defense and answer to plaintiff's complaint herein—denies that she is guilty of inflicting upon the plaintiff indignities, and

She denies that by her treatment and conduct of the plaintiff she has rendered his life unbearable but, on the contrary, she charges the facts to be her treatment and conduct of the plaintiff has uniformly been of a kind, considerate and respectful character, and for further defense and by way of demurrer to plaintiff's complaint, the defendant states said complaint does not set forth facts sufficient to constitute a cause of action against her.

WHEREFORE, the premises being considered, the defendant prays that plaintiff's bill be dismissed for want of equity.

And for further defense and by way of cross-complaint against the plaintiff, defendant makes the following averments:

That she is now and has been continuously since June, 1906, a resident of Benton county, Arkansas. That defendant and plaintiff were lawfully intermarried in the State of Nebraska in the year 1889, since which time plaintiff and defendant lived together as husband and wife until about the 7th day of June, 1910, when the defendant and cross-complainant was by reason of plaintiff's cruel and brutal treatment compelled to leave home. She states and charges that the plaintiff is much addicted to the excessive use of alcoholic liquors and when under the influence of liquor the plaintiff by his conduct and language towards the defendant manifested great dis-

respect and disregard for the feelings and well being of the defendant and does not hesitate to and does employ language and epithets, names and appellations toward and about the defendant without reason or excuse and for no other purpose than to wound her feelings and humiliate her and to show his utter disregard and supreme contempt for her.

The said Lucy Bates further states and shows that the said Edward Bates for a long time before their separation habitually and without any foundation in fact or truth, accused and charged her with infidelity with one George W. Thurman and of being an impure and unfaithful woman and wife. She shows that when she would entreat him to desist in his false and slanderous charges, he would scoff and sneer at her and order her to leave his home and go her way. She further states that the plaintiff Edward Bates, on the 7th day of June, 1910, practically forced her by his conduct and slanders to flee her home for protection and she is informed and believes that since that time hired sleuths have hounded after her in the hope of discovering or of manufacturing evidence detrimental to her good name.

Said Lucy Bates states she has at all times conducted herself as a good pure and faithful wife and has at no time given the plaintiff any grounds or reason to suspect her purity or to challenge her chastity, and that by reason of his persistent and repeated false accusations her life has been made unbearable.

The said Lucy Bates further shows that the said Edward Bates is the owner of real and personal property of the reasonable and fair value of \$75,000.00 consisting of 320 acres of land in York county, Nebraska, described as follows, to-wit, the S. W. 1/4 and in Section 7-8, also town lots in Custer, Oklahoma, and she further shows that about the year 1902 she became the owner in her own and separate right of \$3,000.00 in money and shortly thereafter she loaned \$2,500.00 of the same to her said husband, taking his notes therefor bearing interest at the rate of 8% per annum.

The premises being considered the said cross-complainant prays that the bonds of matrimony heretofore entered into between herself and the said Edward Bates be dissolved and that he be required to restore to her said sum of \$2,500.00 so borrowed from her and 8% interest thereon since July 1, 1902, and that the court award her such

alimony as the facts and law warrant, and all other proper or necessary relief.

LUCY BATES,
Defendant.

By J. A. RICE and D. C. SHANNON,
Attorneys for Defendant.

Filed June 29, 1910, W. T. Maxwell, Clerk.

Answer of Bates to the cross petition of Lucie Bates (Bodie) in Chancery Court of Arkansas, constituting Exhibit "C" of Bates' answer, and also omitted from the printed copy in defendant in error's brief.

EXHIBIT "C"

In the Benton Chancery Court, July Term, 1910.

Edward Bates, Plaintiff,

vs.

Lucie Bates, Defendant.

ANSWER TO DEFENDANT'S CROSS BILL.

Comes this plaintiff and denies each and every allegation made by defendant in her cross bill not hereinafter expressly admitted, and for answer says:

That it is true that the defendant is a resident of Benton county, Arkansas, and has been since 1906; that it is true that she and the plaintiff were legally married in the State of Nebraska in the year 1889, but that it is not true that they lived together since said date until the 7th of June, 1910; but that heretofore they separated in the month of April, 1901, and remained apart for the space of about one year.

That it is not true that this plaintiff was cruel and brutal in his treatment of the defendant, or that he compelled her to leave her home, and he denies said allegation.

That it is not true that plaintiff is much addicted to the excessive use of alcoholic liquors, and when under the influence of liquors by his conduct and language toward defendant manifest or has manifested great dis-

respect for her feelings and well being, or that he does not hesitate to and does imply language, epithets, names and appellations toward and about the defendant without and for no other purpose than to wound her feeling and to humiliate her, and to show his utter disregard and supreme contempt for her, or otherwise, and he denies said allegations.

And by way of answer to the allegation in the cross bill of the said Lucie Bates that the plaintiff has habitually and without foundation and fact, or in truth, accused and charged her with infidelity and adultery and of being impure as a wife, the said Edward Bates states: That the conduct and actions of his said wife with other men has been such as to arouse his suspicions, and that he has frequently remonstrated with her and begged her to desist and refrain from such conduct, but the said Edward Bates states that he has no positive proof of infidelity and adultery on behalf of his said wife, and has frequently told her so, but to say the least of it, her conduct with other men has been very indiscreet and he has so informed her.

And the said Edward Bates further answering says: That it is not true on the 7th day of June, 1910, he practically forced the said Lucie Bates by his temper and slanders or otherwise to flee her home for her protection; that it is not true that he has hired sleuths to hound after her in the hope of discovering and manufacturing evidence detrimental to her good name, and he denies such charge.

That it is not true that the said Lucie Bates has at all times conducted herself as a good, pure and faithful wife, and he denies said allegation.

That it is not true that the said Lucie Bates has at no time given plaintiff any ground or reason to suspect her purity or to challenge her chastity, and he denies said allegation.

That it is not true by any act or conduct of the said Edward Bates that he has made the life of the said Lucie Bates intolerable, and the said Edward Bates further answering the cross bill of the said Lucie Bates, states:

That it is not true as alleged by the said Lucie Bates that he has been blessed in the accumulation of the goods of this world in the sum of \$75,000.00, but he

states to the court that by industry and economy, he has accumulated the following property: 320 acres of land in the State of Nebraska, one-half of which he now owns, the other half being held in trust for Alberta, Clem E. and Josephus Bates of the probable value of \$50.00 per acre; that he owns no lots in Custer, Okla., but that he owns property at Caddo, Okla., of the value of \$300.00; that he owns property and real estate at Siloam Springs, Ark., of the value of \$2,500.00; personal property in Benton county, exclusive of household and kitchen furniture, of the value of \$200.00; household goods of the value of \$1,000; moneys, securities, script and other personal property of the value of perhaps \$6,000.00.

In answer to plaintiff's allegation that in the year 1902 she became the owner in her own separate right of the sum of \$3,000.00, the said Edward Bates states that upon the first separation from the said Lucie Bates, he gave her money in the sum of \$3,000.00, and that when they patched up their differences and again resumed the relation of husband and wife, that she returned \$2,500.00 of the same to him, and that since said time he has used the same in his business; that never at any time did the said Edward Bates come into possession of any money or property acquired by the said Lucie Bates from any one other than from himself.

And the said Edward Bates further states that recently, the said Lucie Bates came into possession of a large amount of money and property, as the said Edward Bates is informed, in the sum of \$3,000.00, from the estate of her mother, who is now dead, and the said Edward Bates charges and alleges that the said Lucie Bates is amply financially able to conduct her defense to the action filed by the said Edward Bates herein, and to conduct the prosecution of the cross bill filed by her herein, without drawing upon the estate of the said Edward Bates for that purpose.

Therefore, he asks that her prayer for alimony, and for suit money and attorney's fee *pendente lite* be denied, and prays that upon the final hearing of this case, that the cross bill of the said Lucie Bates be dismissed for want of equity, and that she take nothing by reason of

the same, and that the said Edward Bates have the relief prayed in his amended complaint filed in this cause.

And will ever pray.

EDWARD BATES.

By WALKER & WALKER, his solicitors.

Filed July 14, 1910, W. T. Maxwell, Clerk.

Deposition of GEORGE W. POST, read in evidence in the divorce suit in behalf of Lucie Bates (Bodie) :

Have resided in York county, Nebraska, 35 years. Am president of the First National Bank. Have bought and sold lands in York County and know their value. Am well acquainted with the Southwest Quarter (SW $\frac{1}{4}$), the South Half of the Northwest Quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$) of section eight (8); and East Half (E $\frac{1}{2}$) of Southeast Quarter (SE $\frac{1}{4}$) of section seven (7), all in town ten (10) North of Range two (2), West in York County, Nebraska and known as Edward Bates' farm. It lies about a mile and a half south of the corporate limits of the city of York. I think it is worth \$41,145. Its rental value is about \$3.50 per acre.

The depositions of seven other witnesses on the same subject were taken by Lucile Bates (Bodie) and read in evidence on the trial of the divorce suit, but are not printed in this connection.

The deposition of W. L. KIRKPATRICK, was taken by Edward Bates and read in evidence on the divorce suit on his behalf:

Am 43. Reside in York, Nebraska and have for the last 15 years. I am a lawyer. Am acquainted with the value of lands in York County, Nebraska. Know the Bates land. Have had charge of the renting and collecting the rent on the same for some years, and know the value and rental income. From 1903 to 1910 the Bates land was rented as follows:

1903.....	\$400.00	1907.....	\$605.00
1904.....	656.10	1908.....	665.00
1905.....	665.00	1910.....	725.00

The taxes during the nine years were \$951.51. There were other expenses and repairs on the farm. The actual value of the land is about \$62.50 per acre.

The depositions of three other witnesses of York, Nebraska, on the same subject, were taken by Edward Bates and read in evidence in the trial of the divorce suit, but are not printed in this connection.

J. WYTHE WALKER testified as follows in the instant suit:

I am 49 years old. Reside in Fayetteville, Arkansas. Was born there. Am a lawyer.

I am acquainted with Section 2681 of Kirby's Digest of the Statutes of Arkansas relating to Divorce and Alimony. This section was passed December 18, 1837, and went into effect March 10, 1838. It reads as follows:

"When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable."

This statute was in force at the time of the trial of the divorce case between Bates and Bates in Benton County Arkansas in 1911.

CHANCELLOR T. H. HUMPHREYS, who presided at the trial of the divorce suit, details the issues that were heard and determined in that suit as follows:

Am 49 years old, Chancellor of the 11th Chancery District of Arkansas. Am member of bar of state and federal court. Benton county is in my district. Presided at the divorce trial between Bates and Bates. Have examined the record in that case today.

Numerous depositions were read and considered on the trial relating to the value and rental income of Bates' property in York county, and considered by the court. The land was supposed to be in the name of the children, or in his name as trustee for the children.

The decree for alimony was a lump sum of \$5,111 "in lieu of any interest that she might have, or claim she

might have for any sum." I first intimated what the court would do in the way of a property finding, and the parties agreed on a lump sum. They agreed on this lump sum as a final settlement, from which no appeal was to be taken. Bates was required to give security for the payment of amount awarded. The court had jurisdiction of the parties and held it had not of the land in Nebraska, but did have jurisdiction to consider its value in determining the amount of alimony.

CROSS EXAMINATION: I think the court asked counsel if they had any authorities bearing on the question whether the court had authority to take into consideration the value of Bates' Nebraska lands. Knowing the law as I thought I did, I don't think I stated that there was no law justifying the court in taking the value of the Nebraska lands into consideration. It was not the first time the proposition had been raised before me.

I remember that Bodie claimed \$2,500 as borrowed money, but the money had merged into Bates' estate. I did not understand it entered into this decree. I think this was a lump sum agreement on your part, provided you could get the cash to end the controversy both as to divorce and as to property rights. I have no definite recollection as to any specific amounts that went into it, other than it just covered the whole claim. I don't remember that the \$5,111 was composed of \$2,500 borrowed money and \$2,333 as one-third of Bates' property. I don't know how counsel adjusted it on the outside, for I am quite sure it was not the amount I indicated I would allow. I decided that I had the right to take the whole thing into consideration and that I would protect her in the collection of the amount awarded. The attorneys went out and adjusted the amount with Bates. I don't think I was a party to the figuring. That was a private agreement between counsel which they announced to the court.

I don't remember stating after the trial that I had not taken the Nebraska land into consideration. I would have held one quarter of the Nebraska lands belonged to the Bates children. I am quite sure I took the Nebraska lands into consideration. Based on Bates' Arkansas property alone, the amount would have been too much. "As an abstract proposition, if a husband owned 320 acres of land worth \$100 an acre, and a house and lot worth \$2,500 and personal property worth \$7,000,

an allowance of \$5,111 to the wife would perhaps not be her share under the Arkansas law; but as a concrete proposition under all the facts and circumstances of this case, I am inclined to think that it was a very equitable settlement between the parties."

REDIRECT: "The evidence showed that Lucie Bodie was the third wife of Edward Bates and that three children were born to him by his first wife, the only children he had; that there was no offspring by Lucie Bodie.

My understanding was that counsel for both sides agreed to the amount; that the judgment was a complete and amicable settlement between the parties of all property rights involved."

Dissenting opinion of Rose J. in Supreme Court of Nebraska, concurred in by Barnes J. and Letton J.

The simple question presented by the appeal should have been determined as follows:

An independent suit in equity to recover additional alimony based on defendant's ownership of land in Nebraska should be dismissed, where the uncontradicted evidence shows that plaintiff had procured a divorce and alimony in another state in a court having jurisdiction to consider the Nebraska land in awarding alimony, that both parties had appeared therein in person and by counsel, that each had asked for affirmative relief and that the value of defendant's interest in the Nebraska land had been made the subject of pleading, proof and argument.

For the purpose of stripping from the controversy conflicting proof relating to extraneous facts and confusing principles of law foreign to the issues, I prefer to make my own statement of the case.

Plaintiff had been the wife of defendant and, in the court of chancery for Benton county, Arkansas, had procured a decree of divorce and alimony on a cross-bill filed by her in a divorce suit instituted by her husband. The Arkansas court granted the divorce March 2, 1911, allowing "\$5,111 in full of alimony and all other demands set forth in the cross-bill." From that judgment no appeal was taken. The petition in the present case was filed in the district court for York county, Nebraska, November 24, 1911. It contains the plea that defendant owns

in York county, Nebraska, lands worth \$48,000, which the Arkansas court had no jurisdiction to, and did not, consider in awarding alimony. To the petition for additional alimony defendant demurred on the ground that the Arkansas decree is a bar to a further recovery and that plaintiff is defeated by estoppel, because she accepted and retained the fruits of the former adjudication. The trial court sustained the demurrer and from a dismissal of the action for additional alimony, plaintiff appealed to this court, where it was held the petition showed on its face that the Arkansas court had no jurisdiction to, and did not, consider defendant's York county lands in awarding alimony. The dismissal, consequently, was reversed and the cause remanded for further proceedings. *Bodie v. Bates*, 95 Neb. 757. A trial on the merits of the case resulted in a decree awarding plaintiff additional alimony in the sum of \$10,000. Defendant has appealed.

The question raised may be stated as follows. Under the facts pleaded and proved in the present case did the court of chancery of Benton county, Arkansas, have jurisdiction to consider the value of defendant's Nebraska lands in determining the amount of alimony to which plaintiff was entitled? If this inquiry should be answered in the affirmative, the question now in controversy was adjudicated in the former action for divorce. In that suit both parties appeared before the court in person and by counsel, each asking for affirmative relief. Defendant's interest in the York county land was there put in issue by the pleadings. Proof of its value was adduced at great length. Whether the Arkansas court, in determining the amount of plaintiff's alimony, had jurisdiction to consider defendant's Nebraska land in York county was a question argued at the trial of the action for a divorce.

It is the policy of the law to determine in one action litigable questions relating to divorce and alimony, unless the legislature has otherwise provided. Society's interest in proper domestic relations and the rights of parties to a suit for a divorce require a complete adjudication in a single action, where jurisdiction to sever marital relations and to adjust property rights exists. Owing to a controversy over the power of an Arkansas court to consider the value of Nebraska land in awarding alimony, the parties have been permitted to narrate in the courts of two states the unhappy and distressing incidents of their married life.

The former appeal presented the sufficiency of a petition alleging that the following provision of an Arkansas statute was the only law of that state authorizing the allowance of alimony to the wife in case of a divorce:

"Where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been released by her in legal form." Kirby's Digest of the Statutes (1904), sec. 2648.

After the case had been remanded to the district court, defendant pleaded and proved another Arkansas statute containing these words: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest of the Statutes (1904), sec. 2681.

This statute, authorizing divorce courts to award alimony according to the circumstances, uses general terms applying to all cases. It confers on the divorce courts of Arkansas the power of similar courts throughout the country. That act was passed long before the enactment invoked by the majority to narrow the jurisdiction of divorce courts. The earlier statute is in full force according to its original import, since it has not been changed, modified or amended in a manner authorized by the constitution of Arkansas. The statutes may be construed together without doing violence to the rules of statutory construction. Both may be enforced. Under the earlier act reasonable alimony may be determined from the circumstances of the parties and the nature of the case. For that purpose, land outside of Arkansas may be considered. Inquiry into general equity power of divorce courts of Arkansas is therefore immaterial. By proper pleadings and proofs the facts relating to defendant's interest in the Nebraska lands were presented to the Arkansas court. If they were not in fact

considered, plaintiff had her remedy by appeal to the supreme court of that state. In any event the question now determined was formerly adjudicated, according to principles of law properly settled. There is no Arkansas precedent to the contrary.

In *Fischili v. Fischili*, 1 Black. (Ind.) 360, the report shows that plaintiff procured a divorce from her husband in Kentucky, where the statute provided that the wife should have a specific share of his property. Subsequently she brought an action in Indiana for additional alimony based on property owned by defendant in that state. A demurrer to the petition was sustained, the court saying:

"This divorce having been granted in Kentucky, and a part of the husband's property decreed to the wife, it is important for us to know how far the rights of the parties, with regard to the provision made for the wife, were adjudicated and determined by the proceedings which were had in that state. For whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case. * * * Guided by this principle, we should naturally suppose that the decree of the circuit court in Kentucky had done all that equity and justice required between the parties, if there is nothing in the record of their proceedings to evince the contrary, nor anything in the case to limit their authority; and that the rights of the parties, being thus determined, were subject to no further litigation. The separate maintenance that should be decreed to the wife out of the husband's property, according to her condition in life, the fortune she brought, and her husband's circumstances, was the subject-matter of adjudication before the court that granted the divorce; and if that tribunal had the power to do ample justice between the parties, but has failed to do it, no other tribunal can take cognizance of the subject, and supply the deficiency." See, also, *McCormick v. McCormick*, 82 Kan. 31.

The decision of the majority that the general statutory power of the Arkansas divorce court to award the wife

reasonable alimony, upon the granting of a divorce, applies alone to cases where the husband obtains the decree is not warranted by the language or intention of the law-makers or by any construction of the supreme court of Arkansas. The earlier Arkansas statute was adopted in the Indian Territory.

In *Ecker v. Ecker*, 22 Okla. 873, it was argued that this section did not authorize a court to grant alimony to a wife when the divorce was granted to the husband for her misconduct. The supreme court of Oklahoma said: "Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case."

Adams v. Adams, 30 Okla. 327, is to the same effect.

In the majority opinion, an estoppel not well pleaded or properly proved, is substituted for a technical plea of *res judicata*. The law on both subjects is confused in disregard of the following observation in *Hanson v. Hanson*, 64 Neb. 506:

"Considerable obscurity may be avoided by keeping in mind the distinction between a judgment, urged as a technical bar to another action, and one that is urged as conclusive as to some one or more points tried and determined in a former action."

In affirming the judgment allowing plaintiff additional alimony in the sum of \$10,000, a technical plea of *res judicata* established by uncontradicted evidence has been disregarded without ending the litigation for alimony. The record shows that defendant has property in Oklahoma. If the decision is right, he may be pursued in that state for still further alimony and in other states where he may have additional property. The decision of the Arkansas court has been reviewed here. Full credit has not been given to the judgment of the court of another state. The decree for additional alimony should be reversed and the action dismissed.

Barnes and Letton, JJ., concur in this dissent.

Petition for a writ of error

No. 19146

IN THE SUPREME COURT OF THE STATE OF
NEBRASKA

Lucie Bodie, Appellee

Vs.

Edward Bates, Appellant

PETITION FOR WRIT OF ERROR

Comes now Edward Bates, the appellant in the above entitled cause, and shows to the court that in the records, proceedings and discussions of this court, the same being the highest court of the State of Nebraska in which a decision could be had in this suit, manifest errors have occurred, greatly to the damage of said Edward Bates, appellant:

1. That as appears in the record and proceedings in the above entitled cause, this said court on the 3rd day of April, 1914, reversed the judgment of the District Court of York County, Nebraska, sustaining the demurrer of said Edward Bates, appellant, to the petition of Lucie Bodie, appellee and remanded said cause to the District Court of York county for further proceedings, thereby holding that said petition set forth a good and sufficient cause of action in favor of Lucie Bodie, appellee, and against Edward Bates, appellant, notwithstanding the fact that it appeared on the face of said petition that in a suit for divorce and alimony theretofore pending in the chancery court of Benton county, Arkansas between Edward Bates and Lucie Bodie, that court then and there having jurisdiction of the parties and the subject matter of said suit for divorce and alimony, and on the 2d day of March, 1911, it rendered a judgment therein, dissolving the marital relation theretofore existing between the said parties and awarding to Lucie Bodie her maiden name and the sum of \$5,111 in full of alimony. The effect of the judgment of this court reversing the judgment of the district court of York county, Nebraska, wherein it sustained the demurrer of Edward Bates, appellant to the petition of Lucie Bodie, appellee, was to deny to Edward Bates, appellant, full faith and

credit in the judicial proceedings of the Chancery Court of Arkansas, dissolving the marital relation between said parties, and awarding to Lucie Bodie a large sum of alimony, to which he was entitled under Section 1, Article IV of the Constitution of the United States.

2. It further appears in the record and proceedings that there was drawn in question in this suit the full faith and credit due to a judgment of divorce and alimony between the parties hereto, rendered by the Chancery Court of Benton county, Arkansas on the 2d day of March, 1911, which court had jurisdiction of the parties and the subject matter of divorce and alimony, and which judgment was alleged to be a complete bar to this suit in the answer of Edward Bates, appellant. That the court, by its judgment dated January 15, 1916, affirming the judgment of the District Court of York County, Nebraska, denied Edward Bates, appellant, the benefit of the Arkansas judgment as a bar to a suit for further alimony in the courts of this state, contrary to the provisions of Section 1 of Article IV of the Constitution of the United States.

3. It further appears from the record and proceedings of this said court that subsequent to the rendition of the final judgment herein on the 15th day of January, 1916, the said Edward Bates, appellant, filed a motion for rehearing under the rules and practice of this said court, and that on the 5th day of February, 1916, this said court overruled said motion for a rehearing, and the judgment of this court entered on the 15th day of January, 1916 affirming the judgment of the District Court of York county wherein it awarded \$10,000 to the appellee, Lucie Bodie, as additional alimony, became the final and fixed judgment of this court.

All of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

WHEREFORE petitioner prays that a writ of error be allowed and that a transcript of record proceedings and papers upon which said decrees or judgments were rendered duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such court in such cases made and provided, and in accordance with law and justice.

Writ of error:

UNITED STATES OF AMERICA, SS.
THE PRESIDENT OF THE UNITED STATES OF
AMERICA

To the Honorable Judges of the Supreme Court of the
State of Nebraska—GREETING:

BECAUSE, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court of the State of Nebraska before you, or some of you, being the highest court of law and equity of the said State of Nebraska, in which a decision could be had in the said suit between LUCIE BODIE, Appellee, and EDWARD BATES, Appellant, wherein there was drawn in question the full faith and credit due to the statutes and judicial proceedings of the Chancery Court of the state of Arkansas under Section One of Article IV of the Constitution of the United States, in that on the 2nd day of March, 1911, the Chancery Court of Benton County, Arkansas, in a divorce proceeding pending in that court between said Edward Bates and said Lucie Bodie, rendered a judgment dissolving the marital relation theretofore existing between said parties, restoring said Lucie Bodie to her maiden name and awarding her the sum of \$5,111 in full of alimony; said court then and there having jurisdiction of the parties and the subject matter of divorce and alimony, said judgment for alimony having been duly paid and satisfied, and the said Edward Bates claims said judgment to be a full and complete bar to the suit of Lucile Bodie for further alimony in this cause, and the decision was against the bar of said judgment of the Chancery Court of Benton County, Arkansas, set up by Edward Bates, appellant, under Section One of Article IV of the Constitution of the United States; a manifest error, therefore, hath happened to the great damage of said Edward Bates, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal and distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme

Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this — day of —, in the year of our Lord One Thousand Nine Hundred and Sixteen.

R. C. HOYT.
By J. H. McCCLAY,

*Deputy Clerk of the District Court of the United States
for the District of Nebraska, Lincoln, Nebraska.*

WRIT OF ERROR ALLOWED.

A. M. MORRISSEY,

*Chief Justice of the Supreme Court of the State of
Nebraska.*

Assignment of Errors:

IN THE SUPREME COURT OF THE STATE OF
NEBRASKA.

Lucie Bodie, Appellee,

vs.

Edward Bates, Appellant.

ASSIGNMENT OF ERRORS.

Comes now the appellant Edward Bates and says that in the record and proceedings in the above entitled cause there is manifest error in this:

1. The Supreme Court erred in reversing the judgment of the District Court of York county, Nebraska, which had sustained the demurrer of Edward Bates, appellant, to the petition of Lucie Bodie, appellee, thereby overruling said demurrer and remanding said cause to the district court of York county, Nebraska, which ruling was entered on the 3rd day of April, 1914.

2. The Supreme Court erred in overruling the demur-
rer of the appellant, Edward Bates, to the petition of
appellee, Lucie Bodie, thereby holding that the petition
stated a cause of action in favor of the appellee, Lucie
Bodie, and against the appellant, Edward Bates, when
it plainly appeared on the face of said petition that in a
divorce proceeding in the chancery court of Benton coun-
ty, Arkansas, between Edward Bates and Lucie Bodie,
the court then and there having jurisdiction of the par-
ties and the subject matter did, on the 2nd day of March,
1911, by its judgment dissolve the marital relation there-
tofore existing between said parties, and restored to
Lucie Bodie her maiden name and awarded to her \$5,111
in full of alimony, which judgment under Section One of
Article Four of the Constitution of the United States
barred the said Lucie Bodie from maintaining this suit
in the courts of the state of Nebraska to recover further
alimony.

3. The court erred in its judgment entered on the 15th
day of January, 1916, affirming the judgment of the
district court of York county awarding to the appellee
Lucie Bodie the sum of \$10,000 as additional alimony,
because it appears by the undisputed record that in a
suit for divorce and alimony between Edward Bates and
Lucie Bodie in the chancery court of Benton county,
Arkansas, then and there having jurisdiction of the par-
ties and the subject matter did, on the 2nd day of March,
1911, dissolve the marital relation between said parties
and restored to Lucie Bodie her maiden name and
awarded her the sum of \$5,111 in full of alimony, which
was duly paid by Edward Bates and received by Lucie
Bodie, which was interposed as a complete bar to this
suit to recover further alimony under section 1 of article
IV of the Constitution of the United States.

4. Because the Supreme Court erred in holding that
Lucie Bodie, appellee, could maintain this suit to recover
additional alimony in the courts of the state of Nebraska
when she had been divorced from the appellant, Edward
Bates, by the chancery court of Benton county, Arkansas,
restored to her maiden name and recovered \$5,111 in full
of alimony in that court. In so holding, this Supreme
Court has denied to Edward Bates, appellant, the benefit
of the full faith and credit in the judicial proceedings of
the chancery court of Arkansas, to which he was entitled
under section 1, article IV, of the Constitution of the
United States.

5. The supreme court erred in holding that the chancery court of Benton county, Arkansas, had no jurisdiction to take into consideration property of Edward Bates situate in the state of Nebraska in its judgment dissolving the marital relation between said parties, in which the subject of alimony was put in issue, and tried and determined by that court, and the sum of \$5,111 was awarded Lucie Bodie as alimony.

6. The supreme court erred in holding that the chancery court of Benton county, Arkansas, which heard and tried the issues in a suit for divorce between Edward Bates and Lucie Bodie, having jurisdiction of the parties and the subject matter, did not in its judgment entered on the 2nd day of March, 1911, take into consideration the interest of Edward Bates in certain lands in York county, Nebraska, when it awarded Lucie Bodie the sum of \$5,111 in full of alimony.

7. The supreme court erred because in its judgment entered on the 15th day of January, 1916, it denied to Edward Bates the benefit of full faith and credit in the statutes of Arkansas and the judicial proceedings of the chancery court of Benton county of said state, which were plead by Edward Bates, appellant, as a complete bar to the suit of Lucie Bodie, appellee, to recover further alimony in the courts of Nebraska under section 1 of article IV of the Constitution.

Wherefore, for these and other manifest errors in the record, Edward Bates prays that the decision and judgment of the supreme court of the state of Nebraska entered on the 15th day of January, 1916, and made final by overruling appellant's motion for a rehearing on the 5th day of February, 1916, may be reversed and said cause dismissed.

FIELD, RICKETTS & RICKETTS,
Attorneys for Appellant.

ARGUMENT.

Sufficient of the record is printed in the two briefs to show that the question for consideration is not divorce or alimony, but the force and effect due to an Arkansas judgment under Section One of Article IV of the Constitution of the United States, when plead in bar to a suit involving the same subject matter between the parties in the courts of Nebraska.

The Chancery Court of Benton County, Arkansas, had jurisdiction of the subject matter of divorce and alimony. The parties were both in court, and Benton county was and had been for some years prior, not only the domicile of the respective parties, but also the marital domicile; so that the question of jurisdiction of that court is eliminated.

The motion seems to be founded on a misapprehension. While it is true that the federal courts disclaim jurisdiction of the subject of divorce and alimony, they have never refused to give force and effect to a judgment rendered in a divorce suit in one state, where the court had jurisdiction of the parties and the subject matter, when drawn in question in another state.

This court has uniformly discriminated between a suit for divorce and alimony, and one to enforce a judgment on that subject when drawn in question in the courts of another state. This is illustrated in *Barber v. Barber*, 21 How. 582, cited in support of the motion. The court in the opinion there says:

"The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject matter and over the parties, as the same parties would be if the decree had been given in the Ecclesiastical Court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction.

"We observe, in confirmation of what has just been said, that the jurisdiction of the courts of the United States is derived from the constitution and from legislation in conformity to it."

Cheever v. Wilson, 76 U. S. 108, was a suit instituted in the District Columbia to specifically enforce that part of a decree in a divorce suit rendered in the courts of Indiana, which determined the property rights between the parties. The court there said relative to the question under consideration:

"The constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. Const., Art. 4, sec. 1; Stat. at L. 122; *D'Arcy v. Ketchum*, 11 How. 175. 'If a judgment is conclusive in a state where it is rendered, it is equally conclusive everywhere,' in the courts of the United States."

Atherton v Atherton, 181 U. S. 155, was a suit by the wife in the courts of New York to recover a divorce and alimony from her husband, a resident of Kentucky. The husband pleaded in bar a decree of divorce obtained by him in the courts of Kentucky. The New York court held the Kentucky decree void on the ground that the wife had not been legally served, and did not appear in the Kentucky court, and rendered a decree in accordance with the prayer of the wife. The judgment was affirmed by the Court of Appeals of New York. The case was carried to the Supreme Court of the United States under the full faith and credit clause of the Constitution. The jurisdiction of that court was not questioned. The case turned on the jurisdiction of the Kentucky court, which was sustained after a review of the authorities. The opinion concluded as follows:

"The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky, and that therefore, their judgment must be reversed."

Streitwolf v. Streitwolf, 181 U. S. 179, was a suit by the wife in New Jersey to recover divorce and alimony. The husband pleaded in bar a North Dakota divorce, recovered on a fictitious domicile which was held to be void.

Lynde v Lynde, 181 U. S. 183, was a suit in New York by the wife to satisfy a judgment for alimony recovered in New Jersey. The judgment was enforced. In the opinion the court said:

"By the constitution and the act of congress requiring the faith and credit to be given to a judgement of the court of another state that it has in the state where it was rendered, it was long ago declared by this court: 'The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state it must be made a judgement there, and can only be executed in the latter as its laws may permit.' "

Andrews v Andrews, 188 U. S. 14, was a controversy in the probate court of Massachusetts between Kate H. Andrews and Annie Andrews, both claiming to be the widow of Charles S. Andrews deceased. Charles S. Andrews had procured a divorce on a fictitious domicile in South Dakota from Kate H. Andrews and then married Annie Andrews. This divorce was interposed as barring the widowhood of Kate H. Andrews. The court held the South Dakota divorce void. On the question of jurisdiction, the court said:

"It was suggested at bar that this court was without jurisdiction. But it is unquestionable that the rights under the constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed, we think it is apparent that it but asserts that as the court below committed no error in deciding the federal controversy, therefore there is no federal question for review. But the power to decide whether the federal issue was rightly disposed of involves the exercise of jurisdiction."

Harding v. Harding, 198 U. S. 317, was a suit by the husband for divorce in California. The wife plead in bar an Illinois decree from bed and board with alimony. The Cali-

fornia courts held the Illinois decree not conclusive against the husband in California. In reversing the case the court concluded its opinion as follows:

"We are of the opinion that the final decree of July 26, 1897, entered in the circuit court of Cook county, Illinois, in legal effect established that the separation then existing, and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a wilful desertion by the wife of the husband. From these conclusions it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case, it follows that the supreme court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the constitution of the United States."

Haddock v. Haddock, 201 U. S. 562, was a suit by the wife in New York for divorce from bed and board and for alimony. The husband in answer, among other things, plead in bar a Connecticut decree of divorce obtained against the wife. The state court held that the Connecticut decree was not conclusive against the wife in New York.

The opinion of the court is exhaustive of both facts and authorities. It concludes as follows:

"Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here an issue, and without intimating a doubt as to the power of the state of New York to give a decree of that character rendered in Connecticut, within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause. It therefore follows that the court below

did not violate the full faith and credit clause of the constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, *affirmed*."

Sistare v. Sistare, 218 U. S. 1, was an action in the courts of Connecticut to enforce an award of alimony to the wife in a suit for divorce from bed and board in the courts of New York. The Connecticut court refused to enforce the past due installments under the New York decree. The court in reversing the Connecticut court, concluded its opinion as follows:

"If the judgment be an enforceable judgment in the state where rendered, the duty to give effect to it in another state clearly results from the full faith and credit clause, although the modes of procedure to enforce the collection may not be the same in both states.

"It follows that the judgment of the supreme court of errors of Connecticut must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

If there was ever a doubt of the jurisdiction of this court to give force and effect to a decree of divorce and alimony rendered by a court having jurisdiction of the parties and the subject matter in one state, when drawn in question in the courts of another state, that doubt would seem to be removed by the repeated exercise of that jurisdiction.

WHAT FULL FAITH AND CREDIT MEANS.

While the merits cannot be considered on the motion, it will do no harm to say that it has been repeatedly held that full faith and credit, as used in the Constitution, means that the Arkansas judgment of divorce and alimony between the parties is conclusive in Nebraska, if conclusive in Arkansas.

Bank of Farnham, 176 U. S. 640.

Green v. Van Buskirk, 72 U. S. 307.

Chew v. Brumagen, 80 U. S. 497.

Harris v. Balk, 198 U. S. 215.

D'Archy v. Ketchum, 52 U. S. 165.

Cheever v. Wilson, 76 U. S. 108.

Craps v. Kelley, 83 U. S. 612

Mills v. Duryee, 7 Cranch. 481.

Hanley v. Donahue, 116 U. S. 1.

A suit for further alimony could not be maintained in the courts of the State of Arkansas.

Bowman v. Worthington, 24 Ark. 522, was a suit by the wife who had obtained a divorce from the husband in the State of Kentucky, without alimony, to recover alimony in the courts of Arkansas through an independent suit, and the court held that she could not recover.

Fischli v. Fischli I. Black, 360, 12 Am. Dec. 51, was a suit by the wife in Indiana to recover additional alimony, after she "had obtained a divorce and alimony from the husband in the courts of Kentucky." The Kentucky decree was pleaded in bar. The court held she could not recover.

ARKANSAS HAD TWO STATUTES ON THE SUBJECT TO ALIMONY.

Two statutes exist in the State of Arkansas on the subject of alimony. One is in the nature of dower, the other alimony. The latter is much the older statute. They are not inconsistent with each other. A claim under one waives a claim under the other.

In *Wood v. Wood*, 59 Ark. 441; 27 S. W. 641, the plaintiff alleged the value of the husband's estate and prayed alimony. She did not ask the benefit of the dower statute of Arkansas. Neither did Bodie. The result was an award of alimony in the sum of \$33,000.00 on error, the supreme court said:

"She therefore has no right to complain in this court that she did not recover that which she neither asked for nor desired. Appellant did not undertake to show in her original bill for divorce that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended there-

after in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than \$200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state."

A like rule under similar statutes obtains in Nebraska.

Tatroe v. Tatroe, 18 Neb. 395.

Walton v. Walton, 57 Neb. 102.

EQUITY POWER OF THE ARKANSAS COURT.

The Arkansas court was one of general chancery jurisdiction. It had jurisdiction of the parties and the subject matter of divorce and alimony. It was not only within the power of that court, but it was its duty, to do complete justice between the parties.

Hepburn v. Dunlap, 1 Wheat 179.

Russell v. Clark, 7 Cranch. 69.

Dewing v. Perdicaries, 96 U. S. 193.

Ober v. Gallagher, 93 U. S. 199.

POWER TO COMPEL CONVEYANCE.

The divorce court had jurisdiction of Bates, and power to compel him to convey to the wife a life interest in one-third of the Nebraska lands, had the court found she was entitled to it.

Fall v. Fall, 75 Neb. 104-128.

Fall v. Eastin, 251 U. S. 1.

French v. Hay, 22 Wall. 250.

Watkins v. Holman, 16 Pet. 25-27.

Corbett v. Nutt, 10 Wall. 464-475.

**THE DIVORCE ENDED THE RIGHT OF THE WIFE TO
FURTHER ALIMONY.**

The logic of the cases in this court, where a decree of divorce in one state was drawn in question in another, herein reviewed, is that a valid divorce, once decreed, terminates the right to alimony everywhere.

In *Barrett v. Failing*, 111 U. S. 523, the wife had obtained a decree of divorce in California in a court having jurisdiction of the partes. She then brought suit in the Circuit Court of the United States for the district of Oregon, wherein she sought to recover title in fee to one-third of land alleged to have been owned by the husband pursuant to an Oregon statute, somewhat similar to the Arkansas statute relied upon by the defendant in error. In the opinion the court says:

"It is not doubted that the decree of divorce from the bond of matrimony, obtained by the plaintiff in California, in a court having jurisdiction to grant it, and after the husband had appeared and made defense, bound both parties and determined their status. The question considered by the court below and argued in this court is whether, by virtue of that decree and under the law of Oregon, the wife is entitled to one-third of the husband's land in Oregon.

"Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other, and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders property to be transferred or alimony to be paid by one party to the other. In estimating and awarding the amount of alimony or property to be so paid or transferred, the court of divorce takes into consideration all the circumstances of the case, including the property and means of support of either party; and the order operates *in personam*, by compelling the defendant to pay the alimony or to convey the property accordingly, and does not of itself transfer any title in real estate, unless allowed that effect by the law of the place in which the real estate is situated."

The award of alimony in the Arkansas decree was entered by consent of Bodie's counsel, if not by Bodie herself. The alimony was paid by Bates and received by Bodie, and she is estopped by that decree.

In *Wood v. Wood*, 59 Ark. 441, a judgment for alimony awarded in gross instead of in kind, said:

"In allowing alimony in a gross sum the court departed from the course usually pursued in such matters, but this was done by consent. She was represented by solicitors, who were acting within the apparent scope of their authority. She has no right to repudiate her acts of record, done by them, but she must abide by them, and hold her solicitors responsible if they were derelict in their duties or unfaithful, to her injury. In rendering a decree in accordance with consent of parties, given by their respective solicitors, no error of law was committed by the court."

The motion is without merit and should be overruled.

Respectfully submitted,

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Lincoln, Nebr., April 26, 1916.

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Number 406.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

EDWARD BATES, PLAINTIFF-IN-ERROR,

VS.

LUCIE BODIE, DEFENDANT-IN-ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF THE PLAINTIFF-IN-ERROR.

FIELD, RICKETTS & RICKETTS,

W. L. KIRKPATRICK,

Attorneys for Plaintiff-in-Error.

SAMUEL P. DAVIDSON,

Attorney for Defendant-in-Error.

STATEMENT.

Brevity and freedom from confusion will be conserved by referring to the plaintiff-in-error as Bates, and the defendant-in-error as Bodie. References are to the pages in the printed record.

The parties to this suit were married in Nebraska in 1889. In 1906 they removed to Benton County, Arkansas, where they continued to reside as husband and wife until 1910 when divorce proceedings were initiated by Bates in the Chancery Court of Benton County, Arkansas, the family domicile of the respective parties.

Bodie filed a cross-bill praying for divorce in her favor and for alimony. To show that she was entitled to considerable alimony, she alleged that Bates owned real and personal property of the value of \$75,000; the personal property and some of the real estate being in Arkansas, and 320 acres of land lying in York County, Nebraska, and a lot, or lots, in Custer, Oklahoma (55, 56). There was no description of the personal property or the real estate lying in Arkansas or Oklahoma. The Nebraska lands were partially described, so that they probably could have been located by extraneous inquiry.

Bates answered the cross-bill, admitting he held the legal title to 320 acres of land in Nebraska, but alleged that one-half of it was held in trust for his children by a former marriage (62, 63).

At the trial a large number of depositions that had been taken touching the value and rental income of the Nebraska lands were read in evidence without objection (67-69), (75, 76). After an exhaustive hearing the decree was entered on March 2, 1911. It awarded Bodie the divorce, restored her maiden name, and allowed her "\$5111.00 in full of alimony and all other demands." It required Bates to secure the alimony awarded (64). The alimony was paid and received within the time limited by the decree (70).

The present suit was brought in York County, Nebraska, in July, 1911, where Bodie obtained personal service on Bates while there on business. The avowed purpose, as alleged in the amended petition, is to recover alimony in addi-

tion to that awarded by the Chancery Court of Benton County, Arkansas. The amended petition alleges that the parties had resided in Benton County, Arkansas for several years prior to the divorce proceedings. It details the several steps which were taken in joining the issues in the divorce proceedings in Arkansas, and that the decree was entered after an exhaustive hearing. The decree of that court is made a part of the amended petition and a copy attached as an exhibit.

It is alleged that the Chancery Court of Benton County, Arkansas, had general equity jurisdiction; that Bodie is entitled to recover additional alimony, on the ground that the only statute in Arkansas providing alimony for the wife in case of divorce gives her "one-third of the husband's personal property absolutely, and one-third of all lands of which her husband is seized of an estate of inheritance at any time during her marriage for her life, unless the same shall have been released by her in legal form"; that the Chancery Court of Arkansas had no jurisdiction of the Nebraska lands under the laws of Arkansas, and had no right to take the same into consideration, and did not take them into consideration, in awarding alimony; that the alimony awarded by the Arkansas court was inadequate.

The prayer was that she might recover additional alimony and that Bates might be restrained from disposing of the Nebraska lands until the additional alimony recovered was paid.

No order of the court was taken restraining Bates from disposing of the Nebraska lands, nor were they sequestered or brought under the control of the court (2-5). Bates demurred to this amended petition on the ground that it did not state facts sufficient to constitute a cause of action in favor of Bodie and against Bates (7). The demurrer was sustained and the action dismissed by the trial court (8). Bodie appealed from the order dismissing her proceedings

to the Supreme Court of Nebraska, which court reversed the ruling of the trial court and remanded the cause for further proceedings (8).

The opinion of the Supreme Court in reversing the ruling of the trial court on the demurrer, holds that the Arkansas court had no jurisdiction over the Nebraska lands, nor any power to take the same into consideration in awarding alimony; that a Nebraska court of equity had authority to award further alimony under its general equity jurisdiction, in the absence of any statute authorizing it to do so; that the fact that Bodie was no longer the wife of Bates was immaterial (9-17).

On remand, Bates answered the amended petition by admitting the divorce proceedings in Benton County, Arkansas, that a copy of the decree was attached to the amended petition. It then set out the steps taken in forming the issues in the Chancery Court of Arkansas, making the respective pleadings in the divorce proceedings a part of the answer; that the issues thus formed were tried to the Chancery Court; that depositions were taken as to the value and rental income of the Nebraska land, which were read in evidence on the trial of the issues; that Bates' interest in the Nebraska lands was considered by the Arkansas court in awarding alimony; that the Arkansas court made findings and decree which are made a part of the answer and a copy attached; that the alimony awarded by the Arkansas court was paid; that "under the Constitution of the United States the findings and decree of the Chancery Court of Benton County, Arkansas, as herein alleged and set forth, are entitled to full faith and credit in the courts of the State of Nebraska; and when full faith and credit is given the findings and decree of Benton County, Arkansas, in this court, said findings and decree constitute a full and complete bar to the plaintiff's alleged right to recover additional alimony under the laws of the State of Nebraska."

The second paragraph of the prayer is as follows:

"Second, that under the full faith and credit clause of the Constitution of the United States the findings and decree of the Chancery Court of Benton County, Arkansas, may be held to be a complete bar to the plaintiff's action in this case" (18-34).

The reply denies that the Chancery Court of Arkansas had jurisdiction to or did take the Nebraska lands into consideration in awarding alimony, and leaves the other allegations of the answer stand as admitted (34-36).

The issues were tried to the court. The material part of the evidence may be summarized as follows:

An exemplified copy of the record of the divorce proceedings in the Chancery Court of Benton County, Arkansas (54-66); Section 2684 of Kirby's Digest of the Statutes of Arkansas passed in the year 1893 (70), and Section 2681 of Kirby's Digest passed in the year 1837 (78). These statutes are as follows:

"Sec. 2684. In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and when the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property, both real and personal, to which such wife is entitled (n); and when it appears from the evidence in the case, to the satisfaction of the court, that such real estate is not susceptible of the

division herein provided for without great prejudice to the parties interested, the court shall order a sale of said real estate to be made by a commissioner to be appointed by a court for that purpose, at public auction to the highest bidder upon the terms and conditions, and at the time and place fixed by the court; and the proceeds of every such sale, after deducting the cost and expenses of the same, including the fee allowed said commissioner by said court for his services, shall be paid into said court and by the court divided among the parties in proportion to their respective rights in the premises. The proceedings for enforcing these orders may be by petition of either party specifying the property the other has failed to restore or deliver upon which the court may proceed to hear and determine the same in a summary manner after ten days' notice to the opposite party. And such order, judgment or decree shall be a bar to all claim of dower in and to any of the lands or personality of the husband then owned or thereafter acquired on the part of his said wife divorced by the decree of the court" (70).

"Sec. 2681. When a decree shall be entered the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable" (78).

The original depositions as to the value and rental income of the Nebraska lands were withdrawn from the files in the Arkansas court and received in evidence in this (68, 69), (75, 76). The testimony of Heaslett (69), Lindsey (70), Shannon (71), McGill (72), and Davidson (73), tended to show that the Chancery Court did not consider the Nebraska lands in its award of alimony. The testimony of Bates (75); Humphreys, the chancellor who heard and tried the divorce case (76); and Walker (78), tended to show the court *did* consider the Nebraska lands in awarding alimony.

On the 13th day of January, 1915, the court made its finding and entered its decree, in which it held that the Chancery Court of Benton County, Arkansas, had no jurisdiction to consider Bates' interest in the Nebraska land and

did not consider it in awarding alimony. That the Nebraska lands were of the value of \$40,000, and awarded \$10,000 as additional alimony (37).

Appeal was taken to the Supreme Court of the State of Nebraska by Bates. After hearing, and on the 15th day of January, 1916, the judgment was affirmed by a divided court: four judges for affirmance and three judges for reversal. Fawcett, J., delivered the opinion of the court (40-50); Rose, J., a dissenting opinion, in which Barnes and Letton concurred (51-54).

ASSIGNMENTS OF ERROR.

1. The Supreme Court of Nebraska erred in holding that the amended petition stated a good cause of action in favor of Bodie and against Bates, and in reversing the order of the trial court in sustaining the demurrer and remanding the cause for further proceedings.
2. The state court erred in holding that the Chancery Court of Arkansas had no jurisdiction to consider Bates' interest in the Nebraska lands in awarding Bodie alimony.
3. The state court erred in holding that the judicial proceedings in the Chancery Court of Benton County, Arkansas, were not a bar to Bodie's suit for further alimony in the courts of Nebraska, under Section 1 of Article 4 of the Constitution of the United States.
4. The state court erred in holding that the Chancery Court of Arkansas did not consider Bates' interest in the Nebraska lands in awarding alimony.
5. The state court erred in awarding Bodie \$10,000 additional alimony.
6. The Supreme Court of the State of Nebraska erred in affirming the judgment of the trial court for \$10,000 additional alimony.

The Supreme Court of the State of Nebraska erred in holding that Bodie's amended petition stated a good cause of action in favor of Bodie and against Bates.

Bates demurred to Bodie's amended petition on the ground that it did not state a good cause of action (7). The trial court sustained the demurrer. Bodie elected to stand on her petition. The court dismissed the action (8). Bodie appealed from this ruling and the Supreme Court, after hearing, reversed the trial court and remanded the cause for further proceedings (8). The opinion of the court is put upon the ground that the Chancery Court of Arkansas had no jurisdiction over, or power to consider, Bates' Nebraska lands in awarding alimony, under the laws of Arkansas (9-17). Although Bates answered on remand and tried the case on its merits, he did not waive the error of the Supreme Court of Nebraska in holding that Bodie's amended petition stated a good cause of action (1), because the demurrer went to the jurisdiction and authority of the Nebraska court to entertain the suit, and (2) because a good cause of action in the complaint is necessary to recovery.

In re Atlantic City R. Co. 164 U. S. 633, the court says:

"In this case, however, the circuit court entertained jurisdiction and the petitioner has its remedy by appeal, if a decree should pass against it. The objection to the jurisdiction presented by filing the demurrer, for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled."

The error was not waived by answering to the merits, because the amended petition did not state a cause of action:

In Teal v. Walker. 111 U. S. 242, the court said:

"When the declaration fails to state a cause of action and clearly shows that, upon the case as stated, the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial without losing the right to have the judgment upon the verdict reviewed for the error in overruling the de-

murrer. The error is not waived by answer, nor is it cured by verdict. The question, therefore, whether the complaint in this case states facts sufficient to constitute a cause of action, is open for consideration."

Unless the amended petition stated a good cause of action there could be no recovery on the merits.

The following facts appear upon, or are necessarily inferred from, the face of the amended petition: (a) The parties were for several years prior to the divorce proceedings domiciled in Benton County, Arkansas. (b) Bates initiated divorce proceedings in the Chancery Court of that county (c) Bodie answered and filed a cross-bill praying a divorce and alimony. As a basis of alimony she alleged Bates' ownership of the Nebraska lands, describing them. (d) After full hearing of the issues, the court granted Bodie a divorce and awarded her, as shown by the decree made a part of the amended petition, "\$5111 in full alimony and all other demands in the cross-bill." (e) That "in the circuit of which Benton County is a part, a regular Chancery Court has been established by law." (f) The right to recover additional alimony is alleged to be because, under the laws of Arkansas, the Chancery Court of that state had no jurisdiction over the Nebraska lands nor right to consider them in awarding alimony.

Do these allegations constitute a good cause of action in favor of Bodie and against Bates?

1. The ordinary elements of jurisdiction in divorce suits is not questioned: that is, jurisdiction over the parties and jurisdiction of the subject matter of divorce and alimony. The allegation in the amended petition concerning the right to recover additional alimony in the courts of Nebraska is as follows:

"Said court (Chancery Court of Arkansas) was limited by the laws of Arkansas from taking into consideration said property lying in York County, Nebraska, in determining the amount of alimony that should be granted to defendant (Bodie) in that suit, who is plaintiff herein."

This allegation does not question the jurisdiction of the Chancery Court of Benton County, Arkansas, over the subject of divorce and alimony as administered in that state. The allegation does not go to the jurisdiction of the court. It goes to what property the court may consider in awarding alimony. In other words, to the relief the court might grant. Therefore, it could not affect and would not affect the validity of the decree of divorce and the award of alimony that was made in the Chancery Court of Benton County, Arkansas. The judgment that was entered and made a part of the amended petition therefore meets all the requirements of Section 1 of Article 4 of the Constitution of the United States, and is entitled to the same force and effect in the courts of Nebraska that it has in the court of Arkansas.

2. Whether the Chancery Court of Arkansas had jurisdiction to consider the Nebraska lands and whether it did consider them or not, is wholly immaterial to the conclusive effect of the judgment that was rendered in the courts of Arkansas; and under the full faith and credit clause of the Constitution, the judgment would still have the same force and effect in the courts of Nebraska, that it had in the courts of Arkansas.

The Chancery Court of Arkansas, as its name implies, and as alleged in the amended petition, was a court of general equity, and in its administration of the subject of divorce and alimony under the laws of Arkansas was bound to exercise the usual and customary powers possessed by courts of equity generally, to do complete justice between the parties. One of these powers possessed by all courts of equity was that when the court acquired jurisdiction of the subject matter of divorce and alimony it would retain that jurisdiction until the rights of the parties were fully determined. The principle is familiar and the cases that support the proposition are numerous. These cases are cited in another connection and will not be repeated here. They will be found at pages 19-21 of this brief.

The Arkansas court also had recourse to another equitable jurisdiction, equally efficient and potent to the ends of justice. Bates was within the jurisdiction of the court and subject to its order. It was within the clear jurisdiction and power of the court to have compelled him to convey to Bodie such interest in the Nebraska land as the court found she was entitled to under the laws of Arkansas. Citations in support of this proposition will be found at pages 22, 23 under another head. It can not therefore be said that as a proposition of law the Chancery Court of Arkansas had no jurisdiction to consider the Nebraska land in awarding alimony. On the contrary, it did have jurisdiction to consider the Nebraska land, and to render a money judgment, as the equivalent of the interest that Bodie was entitled to therein, or to have compelled Bates to convey to her such interest in the Nebraska land as she was entitled to under the Arkansas statute.

3. If it be assumed that the Chancery Court of Arkansas had no jurisdiction or power to consider Bates' Nebraska lands in awarding alimony because of the peculiar statute of Arkansas, still the judgment awarding alimony is entitled to the same force and effect in the courts of Nebraska that it has in the courts of Arkansas. The parties were citizens of and domiciled within the state of Arkansas. That state had power to fix by legislation the alimony that might be recovered by the wife in the event of divorce.

It is claimed that under the legislation of Arkansas, the Chancery Court of that state could not consider Bates' Nebraska lands in awarding Bodie alimony. Assuming this contention to be true, the validity of that legislation and the judgment for alimony in pursuance thereto is not questioned.

The conclusive effect of the judgment in Arkansas is conceded. The judgment must have the same force and effect in the courts of Nebraska that it has in the courts of Arkansas under the full faith and credit clause of the Constitution.

This logically and necessarily follows where the power of Arkansas to legislate on the subject is conceded.

If Lord Campbell's Act, which limits recovery for death from the negligence of another to \$5000, was a part of the legislation of Arkansas, and no legislation limiting recovery existed in Nebraska, could \$5000 be recovered in the courts of Arkansas, and a suit maintained for additional recovery in the courts of Nebraska on the ground that the Arkansas recovery was inadequate? Certainly not. Yet the case is identical in principle with that made in the amended petition. If a recovery in the courts of one state, where the amount is limited by legislation, has not the same force and effect, when drawn in question in the courts of another state, that it has in the courts of the state where rendered, section 1, article 4 of the Constitution will be shorn of its application to a large per cent of the judicial proceedings in the respective states.

4. It appears from the amended petition that Bodie had been divorced from Bates and had been awarded \$5111 in full of alimony by a valid decree in the Chancery Court of Arkansas. No reservation was made in that decree for the recovery of further alimony. Bodie, at her own request, had judicially ceased to bear his name. The Arkansas decree was *res judicata*. An action for additional alimony would not lie.

Barrett v. Failing, 111 U. S. 523.

Atherton v. Atherton, 181 U. S. 155.

Bowman v. Worthington, 24 Ark. 522.

Bauman v. Bauman, 18 Ark. 320.

Fischli v. Fischli, 1 Black (Ind.) 360.

Ober v. Ober, 28 N. Y. S. 23.

Tatro v. Tatro, 18 Neb. 395.

Eldred v. Eldred, 62 Neb. 613.

Vol. 1. Ruling Case Law, subject "Alimony," sec. 84.

Vol. 2. Nelson on "Divorce and Separation," sec. 903.

In *Barrett v. Failing, supra*, the court said:

"Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders property to be transferred or alimony to be paid by one party to the other."

In *Fischli v. Fischli*, 1 Black, *supra*, a leading case, the court said:

"This divorce having been granted in Kentucky, and a part of the husband's property decreed to the wife, it is important for us to know how far the rights of the parties, with regard to the provisions made for the wife, were adjudicated and determined by the proceedings which were had in that state. For whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case."

In 1 Ruling Case Law, *supra*, the author announces the law as follows:

"Ordinarily a valid decree of divorce, even though obtained in a foreign jurisdiction, bars a subsequent application for alimony alone. Although some courts have justified the rule on the ground that the marriage relation has ceased to exist and there is therefore no basis for an allowance of alimony, the true principle on which such decisions proceed is the doctrine of *res judicata*, for as the question of alimony might and should have been litigated therein, the judgment is final not only as to the marital status but as to alimony as well."

In *Eldred v. Eldred, supra*, where the wife recovered a divorce and alimony in Illinois and afterward sought to recover additional alimony in Nebraska, the court said:

"The marriage relation that existed between the present plaintiff and defendant has been dissolved by a court of plaintiff's own selection. They are no longer husband and wife. The duty and obligation that once existed to support and maintain the plaintiff does not now rest upon the defendant. He is no longer her husband, and no legal obligation is imposed upon him to provide for her maintenance; hence there exists no right to alimony."

There is no evidence nor sufficient findings that the Chancery Court of Arkansas had no jurisdiction to consider Bates' Nebraska land in awarding alimony under the laws of Arkansas, as alleged in the amended petition.

When this suit was brought, Bodie foresaw that under the full faith and credit clause of the Constitution the judgment for divorce and alimony in the Chancery Court of Arkansas would be a bar to the recovery of further alimony in the courts of Nebraska, unless she could show that the divorce decree fell within some well-recognized exception to the application of the full faith and credit clause of the Constitution. To escape the effect of this clause, she alleged:

"Said court (chancery court) was limited by the laws of Arkansas from taking into consideration said property lying in York County, Nebraska, in determining the amount of alimony that should be granted to defendant (Bodie) in that suit, who is plaintiff herein." (3)

Under this allegation Bodie hoped to show that the divorce decree did not fall within the application of the full faith and credit clause of the Constitution. The only proof in support of this allegation was section 2684 of Kirby's Digest of the Statutes of Arkansas, passed in 1893 (70). There is nothing in this statute which either expressly or by necessary implication prohibited the Chancery Court from considering Bates' Nebraska lands in awarding Bodie alimony. There are no negative or prohibitive words in this statute. There is no reference to the *jurisdiction* of the divorce court. It does not fix the place or conditions under which the Chancery

Court might exercise jurisdiction, either with reference to lands in Arkansas or lands without Arkansas. Nor are there any words or necessary implications which prohibit the Chancery Court of Arkansas in divorce proceedings from exercising the ordinary powers common to courts of equity generally; that is, that prohibited the court, when it had acquired jurisdiction, from retaining that jurisdiction to do complete justice between the parties, or from ordering the husband to convey to the wife such interest in lands lying beyond the state, owned by the husband, as is required by section 2684 of Kirby's Digest of the Statutes of Arkansas, and enforcing that order.

Section 2684 of Kirby's Digest of the Laws of Arkansas standing alone, does not sustain the allegation quoted from the amended petition. This allegation was material. It was therefore necessary that Bodie, to avoid the bar of the decree in the divorce suit, supplement Section 2684 of Kirby's Digest with the construction or application given it by the courts of Arkansas, so as to show that under this statute and under its construction and application by the courts of Arkansas, a Chancery Court of that state, when sitting in a case of divorce and alimony, could not take into consideration lands owned by the husband, which were situate beyond the boundary of the state, in awarding alimony. This was necessary in order to show that the full faith and credit clause of the Constitution has no application to divorce decrees rendered under the laws of Arkansas. Whether Section 2684 of Kirby's Digest of the Statutes of Arkansas had been construed by the courts of Arkansas so as to prevent the divorce courts of that state from considering lands which lay beyond the boundaries of the state in awarding alimony, was a question of fact, which required proof, as any other fact, to prevent the application of the full faith and credit clause of the Constitution to decrees of divorce and alimony where the husband owned lands, the situs of which was beyond the boundary of the state.

In *Hanley v. Donoghue*, 116 U. S. 1, where the court had a like question to consider, it is said in the opinion:

"No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice."

In *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, the court, speaking to the same question, uses this language:

"The claim of the Railroad Company is that by the law and usage in Illinois, the operative effect of its charter in that state is to make such a contract as that now sued on *ultra vires*.

"Whenever it becomes necessary under the requirement of the Constitution for a court of one state, in order to give faith and credit to the public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon."

In *Lloyd v. Mattheus*, 155 U. S. 129, the court, speaking to this question, says:

"And whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact. *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615; (30:519), *Hanley v. Donoghue*, 116 U. S. 1 (291:535).

"The court of appeals was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the state of Ohio, or to prove the common law of that state by the parol evidence of persons learned in that law, or to put in evidence the laws of that state as printed under the authority thereof, as provided by the law of Kentucky."

The finding of the court in the instant case is as follows:

"The court further finds that the Court of Chancery of Benton County, Arkansas, did not have jurisdiction or

authority to take into consideration, in the divorce proceedings mentioned in the pleadings, the lands mentioned in petition herein lying and being in York County, Nebraska, or their value, in fixing the amount of allowance allotted to the respondent in said divorce proceedings in said court of Chancery."

Observe the wording of this finding. It is not that the Chancery Court of Arkansas had no jurisdiction under the laws of Arkansas or the statutes and adjudications of Arkansas; but, it is that the Chancery Court of Arkansas had no jurisdiction, that is, according to the judicial opinion of the court of Nebraska, or the laws of Nebraska, and not according to the laws of Arkansas. There is no finding that the Chancery Court of Arkansas, under the laws of Arkansas, could not exercise the ordinary powers possessed by Chancery courts generally. The distinction between a finding that the court had no jurisdiction under the laws of Arkansas, and a finding by a Nebraska court that the Chancery Court of Arkansas had no jurisdiction, is fundamental—and not hyper-critical. The first is that the Chancery Court of Arkansas had no jurisdiction under the laws of Arkansas; the latter is that the Chancery Court of Arkansas had no jurisdiction under the judicial law of Nebraska.

It is clear that neither the evidence nor the findings of the court sustained the allegation contained in the amended petition, and it is not shown or found that the Chancery Court of Benton County, Arkansas, did not have jurisdiction under the laws of Arkansas to take the Nebraska lands into consideration in awarding alimony, nor is it shown or found that under the laws of Arkansas the Chancery Court of that state was prevented in divorce proceedings from exercising the powers possessed by Chancery courts generally.

The Chancery Court of Arkansas had jurisdiction to consider the Nebraska lands in awarding alimony.

It is not questioned in the amended petition, nor in the decree or opinion of the Nebraska court, that the Chancery Court of Benton County, Arkansas, had jurisdiction of the subject matter of divorce and alimony and of the parties, and that the findings and decree made by it divorcing Bodie from Bates and awarding the former \$5,111.00 in full of alimony, were valid and binding under the laws of Arkansas.

The amended petition alleges, however, that Bates had lands in Nebraska, and that, under the laws of Arkansas, the Chancery court of that state had no jurisdiction over these lands, nor power to consider them, in awarding alimony. The decree and the opinion of the Nebraska court rely upon Section 2684 of Kirby's Digest of the Statutes of Arkansas, passed in 1893, for support. The gist of this Section, which is copied *haec verba* elsewhere, is, that a wife on the recovery of a divorce shall be entitled to one-third of her husband's personal property absolutely and one-third of his real estate for her natural life. The word "jurisdiction" is not in this statute, nor can its equivalent be found in it. The *situs* of the husband's real estate is not made to have any relation whatever to the court, which can alone acquire jurisdiction of the divorce proceedings because of the necessary domicil of at least one of the parties. So that the divorce proceedings might be pending in one county and the whole or a part of the husband's lands lie in a remote county of the state, or in a foreign state, and the court still have jurisdiction of the divorce proceeding. The husband's personal property might also consist partly or wholly of money or securities that could be, and probably would be, kept beyond the reach of the court. Such circumstances would not affect the jurisdiction of the Chancery Court of Arkansas to grant a divorce and award the wife alimony.

The amended petition contains this important allegation:

“‘Circuit courts have general equity jurisdiction as at common law, except in the County of Pulaski, and where separate chancery courts have been established by law.’”

“Plaintiff further alleges that in the circuit of which Benton County, Arkansas, is a part, a regular chancery court has been established by law.”

The Chancery Court of Arkansas would be bound to exercise all the powers at its command to give the wife the benefit of the statutes of that state providing for alimony. A familiar principle, recognized by the courts of equity everywhere, is that when a court of equity acquires jurisdiction of the subject matter and of the parties for one purpose, it will retain that jurisdiction for the purpose of doing complete justice between the parties.

Ober v. Gallagher, 93 U. S. 199.

Dewing v. Perdicaries, 96 U. S. 193.

Clark v. White, 12 Peters, 178.

Gormley v. Clark, 134 U. S. 338.

This principle obtains in the courts of equity in Arkansas and Nebraska:

Vaughen v. Bowie, 34 Ark. 278.

Estes v. Martin, 34 Ark. 410.

Conger v. Cotton, 37 Ark. 286.

Bonner v. Little, 38 Ark. 397.

Norman v. Puch, 75 Ark. 32.

Jarratt v. Langston, 99 Ark. 438.

Buchanan v. Griggs, 20 Neb. 165.

Swift v. Dewey, 20 Neb. 107.

Tully v. Keller, 45 Neb. 220.

Bank v. Alter, 61 Neb. 359.

In *Jarratt v. Langston, supra*, the Arkansas court said:

“We think, therefore, that the complaint did disclose an equitable element to which the jurisdiction of chancery did attach; and the court of chancery, upon obtaining

jurisdiction of the matter in controversy, should have retained the case for the adjudication of all the rights between the parties. Having jurisdiction of a case for one purpose, a court of equity will retain jurisdiction thereof to fully try and determine the case for all purposes, and finally decide the rights of the parties therein."

In *Buchanan v. Griggs, supra*, the Nebraska court said:

"It is a well settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation."

2 Nelson on *Divorce and Separation*, Section 903, says in reference to alimony:

"The court sitting as a court of equity and having the parties before it will not render a decree disposing of part of the questions before it, leaving the parties to resort to further litigation, but under its equity jurisdiction will proceed to decide all the issues which arise in the case and will award complete relief."

2 Bishop on *Marriage and Divorces*, at section 1123 says:

"A husband had lands in New York but none in Connecticut. Thereupon the Connecticut tribunal made division by estimating their value and requiring him to pay the wife her proper portion in money."

Sanford v. Sanford, 5 Day, 353, is cited, in which the court says:

"1. Whether it is competent for the Superior court in any case on granting a bill of divorce to decree to the wife, she being the innocent party, the payment of a specific sum of money, as alimony? And if so,

"2. Whether it was competent for the court to do this in the present case?

"The words of the statute in relation to this subject are 'and it shall be in the power of the superior court to assign to any woman so separated such reasonable part of the estate of her late husband, as in their discretion the circumstances of the estate may admit, not exceeding one-

third part thereof.' * * * The Superior court in granting a bill of divorce to the wife, she being the innocent party, has, where the situation of the estate would not, literally, admit of an assignment of a part, uniformly decreed the payment of a sum of money. This practical construction seems clearly to be within the equity of the statute; the object of which was a reasonable allowance to the innocent and unfortunate wife out of an offending and unprincipled husband.

"A different construction would put in the power of the husband, owning a large real estate, for the purpose of defrauding an injured and distressed wife, to dispose of the whole, convert it into money, and leave nothing for the decree to operate upon.

"The second question arises from the objection that it is not competent for the court, in this case, to grant alimony, for want of jurisdiction, that the court proceeded as a court of chancery and that neither person nor property was within its jurisdiction. It is true that a court of chancery must have, at least, either one or the other—a court of chancery can not, any more than a court of admiralty, act without having the power to enforce its decrees. * * * In the present case, the respondent was not merely nominally in court. He was in court, like any other suitor, by his counsel, an officer of the court, duly retained in the cause. This gave the court jurisdiction as a court of chancery, to pass a decree *in personam*. And it is no objection, that the decree can not be carried into effect. The only question is, was it properly made? There may be a natural cause why it can not be executed. A man may be a bankrupt or a knave, and abscond with all his property. It must be conceded, on all hands, that the court had jurisdiction of the cause. The parties were heard upon the merits. It must, therefore, be competent for the court to decide upon it; and in deciding, to pass such decree as the nature of the case requires."

The Chancery Court of Arkansas had before it the evidence of the value and the rental income of the Nebraska lands. (Stipulation 67. Depositions 68-69), and the life expectancy of Bodie as shown by the mortality tables. (Davidson 73.)

It must be conceded that the Chancery Court of Arkansas had jurisdiction and power under this equitable principle to

consider Bates' interest in the Nebraska lands in awarding alimony. If the court did not consider these lands Bodie's remedy was an appeal to the Supreme Court of that state.

A second jurisdiction or recourse possessed by the Chancery Court of Arkansas, equally potent and effective to subserve the ends of justice, was the power to order Bates, over whom it had jurisdiction, and who was personally present, to convey to Bodie such interest in the Nebraska lands as the Statute of Arkansas, or equity required, and to coerce him to convey the same.

4th Pomeroy on Equity Jurisprudence, 3rd Ed. Sec. 1318.

Fall v. Eastin, 215 U. S. 1.

Phelps v. McDonald, 99 U. S. 298.

Carpenter v. Strange, 141 U. S. 87.

Fall v. Fall, 75 Neb. 104-128.

Fall v. Eastin, supra, involved an order of a Washington court in divorce proceedings touching Nebraska lands. In that case the court failed to compel the defendant to convey the Nebraska lands in accordance with its decree, but ordered them to be conveyed by a commissioner. Suit was brought in Nebraska to recover the land relying on the commissioner's deed and the order, and in reviewing the case on error to the Supreme Court of Nebraska, this court used the following language:

"A court of equity having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person. Whatever it may do through the party it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to affect it with liens or burdens. Story, *Confl. L.* Sec. 554. In *French v. Hay* (*French vs. Stewart*), 22 Wall, 250-252, 22 L. ed. 857, 858, this court said that a court of equity, having jurisdiction *in personam* has power to require a defendant 'to do or refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.'"

In Fall v. Fall, supra, the Supreme Court of Nebraska in reviewing the same litigation, used the following language:

"We think there can be no doubt that, where a court of Chancery has by its decree ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion is valid and effectual, wherever it may be assailed."

Here was jurisdiction and power to require Bates to convey to Bodie a life interest in one-third of the Nebraska lands owned by him, in strict compliance with Section 2684 of Kirby's Digest of the Arkansas Statutes.

Section 2681 of Kirby's Digest of the Statutes of Arkansas, passed in 1837, reads as follows:

"When a decree shall be entered the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable."

If this statute was available to the court in awarding alimony to Bodie in the divorce suit, there would be no doubt that the court could consider the value and rental income of Bates' interest in the Nebraska lands in connection with the expectancy of Bodie, and award her such sum in bulk as the court might think proper, because of Bates' ownership of the Nebraska lands.

This section, like Section 2684 of Kirby's Digest of the Statute of Arkansas, is remedial; in other words, it goes to the remedy of the wife. The Nebraska court would construe this statute as applying only when the husband recovers the divorce, and the wife is the guilty party. There is nothing in the language of the section of doubtful meaning. It is so clear and definite that the language is not susceptible of misconstruction.

The Nebraska court relies on *Pryor v. Pryor*, 88 Ark. 302, and makes the following quotation from that authority:

"Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in *any* case, even to a guilty wife."

This language of the Arkansas court does not sustain the Nebraska court's version of Section 2681 of Kirby's Digest of the Statutes of Arkansas. The Arkansas court construes this statute to be broad enough to warrant the court to award alimony "in any case." If "in *any* case," why not in the Bodie-Bates case?

McConnell v. McConnell, 98 Ark. 193, was an action for divorce and alimony. In the opinion the court says:

"The allowance of alimony is within the sound discretion of the court, and the Chancellor is entitled to know all the facts which would influence him in fixing the amount."

That is, if the husband owned real estate, the situs of which was beyond the jurisdiction of the court, it would be the duty of the court to ascertain the value of the non-resident land, and its rental income, and be governed by the information derived from this source in awarding alimony.

The opinion in this case was handed down in 1911, some eighteen years after the passage of Section 2684 of Kirby's Digest, and yet the court did not find that Section 2684 prevented the court from ascertaining the facts of the husband's estate and rendering a bulk sum of alimony accordingly.

Section 2681 had been in force more than fifty years prior to the passage of Section 2684 of Kirby's Digest of the Statutes of Arkansas, and during that long term was the only statute authorizing the Arkansas court to award alimony.

The Nebraska court speaks of the two statutes as though they were a part of one and the same enactment, when, as stated, the record shows one had been in force more than fifty years before the other was passed. In Section 2681 the divorce court had express authority to award Bodie alimony based on the property owned by Bates, wherever situate.

The decree of the Chancery Court of Benton County, Arkansas, awarding Bodie an absolute divorce and \$5,111.00 in full of alimony, was a bar to the recovery of additional alimony in the courts of that state.

(1.) It appears from the amended petition that the Chancery Court of Benton County, Arkansas, was a court of general equity jurisdiction; that the parties were then citizens of Arkansas domiciled in Benton County; that they respectively appeared and joined issues in the divorce proceeding; that Bodie in her cross bill prayed for an absolute divorce and alimony. To show she was entitled to considerable alimony she alleged Bates owned 320 acres of land in Nebraska and other property. That after a full hearing the court decreed her an absolute divorce. The decree is made a part of the amended petition and a copy attached as an exhibit.

The amended petition further alleges that under the laws of Arkansas the Chancery Court had no jurisdiction to consider the Nebraska lands in awarding Bodie alimony, and this is the alleged ground of right of recovery of additional alimony. That the Chancery Court of Arkansas had jurisdiction of the parties and the subject matter of divorce and alimony as administered under the laws of that state is not questioned.
(2-4.)

The record discloses that depositions were taken in the divorce proceeding by the respective parties and read in evidence, showing the value and rental income of the Nebraska lands (Stipulation 67. Depositions 68-69). That the question of the divorce court's authority to consider these lands

in awarding alimony was the subject of contention at the trial. (Lindsey and Shannon, 71; McGill, 72; Davidson, 74; Humphreys, 77; Walker, 78).

The decree recites that "judgment is rendered by the consent of plaintiff (Bates) on condition that no appeal be taken by the defendant (Bodie) from the judgment and decree herein rendered." No appeal was taken and the alimony was paid by Bates and received by Bodie (64). What was this but a consent decree and the waiver of an appeal?

The allegations and the decree awarding \$10,000.00 additional alimony are based on the contention that the Chancery Court of Arkansas had no jurisdiction to consider the Nebraska lands, or their value, in awarding alimony. If it could not consider these lands, nor their value, in the divorce suit, how could it consider them in an independent suit? The right to maintain this suit in the courts of Nebraska is based on the alleged fact that the courts of Arkansas could not grant the relief prayed for. In other words, that the divorce suit was final and conclusive between the parties in the courts of Arkansas. The adjudicated cases in that state confirm the fact that the decree in the divorce suit was conclusive between the parties in the courts of Arkansas.

Appeal was Bodie's remedy, if any, in the courts of Arkansas, if the alimony was inadequate. This she waived.

In *Bauman v. Bauman*, 18 Ark. 320, where the wife had obtained a divorce and the allowance of alimony, and she brought suit in the nature of a bill of review to recover additional alimony on the ground that the alimony that had been awarded was inadequate, the court said:

"In so far as the bill seeks an alteration in the original decree upon the ground that any of the allowances therein made were meager and inadequate, it is clear enough that no foundation is thereby laid for any relief, because, if there was any ground for that complaint, the complainant ought to have appealed. Such decrees are doubtless

within our statute regulating appeals. And, having failed to seek that remedy, there can be no rational pretense in the allegations of this bill that any foundation is laid for relief on that ground in the nature of a bill of review."

In *Bowman v. Worthington*, 24 Ark. 522, Bowman had been divorced from Worthington by the legislature of the state of Kentucky, and subsequently brought suit in Arkansas to recover alimony from Worthington, her former husband. In reviewing the case the court said:

"From the views thus given and the authorities we have examined, we have come to the conclusion that alimony being an incident to the divorce by the peculiar phraseology of our statutes, the courts of this state can only so grant it, and that in connection with the decree, and the Circuit Court has not jurisdiction to entertain a separate application for alimony."

The Arkansas decree is conclusive on its face. It reserved no right to Bodie to maintain a suit to recover additional alimony. (64-65.) Nor was it asked to reserve such a right, so far as the record of that case shows. (55-56.)

It has been held that a court may in entering a decree divorcing the wife from the husband reserve to the divorced wife the right to recover alimony in a different suit, in which event the decree of divorce will be no bar.

Woods v. Waddle, 44 O. S. 449.

Galusha v. Galusha, 138 N. Y. 272.

Ex Parte Ambrose, 72 Cal. 398.

This is because the decree expressly reserves the subject of alimony for future consideration.

Nelson, Vol. 2, of his work on Divorce and Separation, at section 903, says:

"The true doctrine of the law of permanent allowance after a total divorce is that such a decree is a final adjudication of the property rights of both parties. This may be a new doctrine to those who have considered the allowance to be the same as the permanent alimony of

the common law. But this is clearly the doctrine of all modern authorities which distinguish between the two kinds of alimony. The court in making the allowance must estimate the property of both parties, and adjudicate all claims which one party has against the other. The court, sitting as a court of equity, and having the parties before it, will not render a decree disposing of part of the questions before it, leaving the parties to resort to further litigation; but under its equity jurisdiction will proceed to decide all the issues which arise in the case, and will award complete relief."

In *Barrett v. Failing*, 111 U. S. 523, a wife who had recovered a divorce from her husband in the courts of California, sought to recover one-third of the husband's lands lying in Oregon, in accordance with an Oregon statute. This court, in reviewing the judgment denying recovery, among other things, said:

"It is not denied that the decree of divorce from the bonds of matrimony, obtained by the plaintiff in California, in a court having jurisdiction to grant it, and after the husband had appeared and made defense, bound both parties and determined their status. The question considered by the court below and argued in this court is whether, by virtue of that decree and under the law of Oregon, the wife is entitled to one-third of the husband's land in Oregon.

"Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders property to be transferred or alimony to be paid by one party to the other."

In 14 Cyc. of L. & P. 794, the authorities are collected in support of the law, which is stated as follows:

"A judgment or decree allowing alimony is final and concludes all parties, unless an appeal is taken therefrom, or an application be made for revision or modification under statutory authority."

The judicial proceedings had in the Chancery Court of Arkansas are entitled to the same faith and credit in the courts of Nebraska that they have in the courts of Arkansas.

The jurisdiction of the Chancery Court of Arkansas over the subject matter of divorce and alimony is not questioned. Neither is the fact that the parties were citizens of Arkansas and domiciled in Benton County of that state, or that the court had jurisdiction over them, questioned.

The exemplified record of the divorce proceedings shows that the respective parties appeared by pleadings and by counsel (55-56). Bodie's cross bill made the Nebraska land in part a basis of her claim for alimony (55-56). On the trial the value of these lands and their rental income were proved. (Stipulation 67.) (Depositions 68-69.) The decree awarded Bodie the divorce and \$5,111.00 in full of alimony (64). The validity of this decree is not questioned in the amended petition, nor in the decree, or opinion of the Nebraska court. The alimony awarded was paid by Bates and received by Bodie (Hiaslett 70, S. C.). This decree was final and conclusive between the parties in the courts of Arkansas and no action would lie in the courts of that state to recover further alimony.

Whether the judgment rendered in the divorce suit in the Chancery Court of Benton County, Arkansas, and drawn in question in this suit, was given the full faith and credit in the courts of Nebraska required by Section 1 of Article IV of the Constitution, is a federal question which this court will determine for itself.

Great Western Telegraph Co. v. Purdy, 62 U. S. 329.
Huntington v. Attril, 146 U. S. 657.
Suposseur v. Rochereau, 88 U. S. 130.
Crescent City, L. S. L. Co. v. Butchers, etc. 120 U. S. 141.
Carpenter v. Strange, 141 U. S. 87.

Section 1, Article IV of the Constitution of the United States reads as follows:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Pursuant to this section of the Constitution, Congress passed Section 905 of the Revised Statutes of the United States, which reads as follows:

"The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

If full faith and credit is given the judicial proceedings of the Chancery Court of Arkansas, then, under the constitutional provision above quoted, they have the same force and effect in the courts of the state of Nebraska that they have in the courts of Arkansas. That is, they are as final and conclusive on the parties in the courts of the state of Nebraska as they are in the courts of the state of Arkansas.

This question has been before this court in numerous adjudicated cases, and the holding is uniform that the judicial proceedings of the courts of one state, having jurisdiction of the parties and the subject matter, are as conclusive upon the

parties in the courts of another state as they are in the courts of the state where they were rendered.

Mills v. Duryee, 7th Cranch, 481.
Green v. Van Buskirk, 72 U. S. 307.
Christmas v. Russell, 72 U. S. 290.
Cheever v. Wilson, 76 U. S. 108.
Chew v. Brumagen, 80 U. S. 497.
Hanley v. Donohue, 116 U. S. 1.
Carpenter v. Strange, 141 U. S. 87.
Bank v. Franham, 176 U. S. 640.
Harris v. Balk, 198 U. S. 215.
Atherton v. Atherton, 181 U. S. 155.
Lynde v. Lynde, 181 U. S. 183.
Harding v. Harding, 198 U. S. 317.
Sistare v. Sistare, 281 U. S. 1.

In the early case of *Mills v. Duryee*, *supra*, the court, speaking of the construction and effect of Section 1, Article IV of the Constitution, and Act of Congress passed in pursuance thereto, says in the opinion:

"It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument can not be supported. The act declares that the record duly authenticated shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz., record evidence, it must have the same faith and credit in every other court. Congress have, therefore, declared the effect of the record by declaring what faith and credit shall be given to it.

"It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also."

In *Cheever v. Wilson, supra*, it is said:

"The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. Const. Art. 4, Sec. 1; Sta. at L. 122; *D'Arcy v. Ketchum*, 11 How. 175. 'If a judgment is conclusive in a state where it is rendered, it is equally conclusive elsewhere,' in the courts of the United States."

In *Chew v. Brumagen, supra*, the court said:

"Confessedly the judgment must have the same effect given to it in the courts of New Jersey as it has in the state of New York by the laws of that state, and either of the parties to it has, under the Constitution of the United States, a right to insist that such shall be its operation."

In *Atherton v. Atherton, supra*, the wife brought suit in the courts of New York to recover divorce and alimony from her husband, a resident of Kentucky. The husband appeared and plead in bar a decree of divorce obtained by him in the courts of Kentucky. The New York court held the Kentucky decree void on the ground that the wife was not served in the state of Kentucky, and that the Kentucky court, which proceeded on a substituted service, obtained pursuant to a statute of that state, acquired no jurisdiction over the wife who was at the time an alleged resident of the state of New York and gave the wife the relief prayed.

The husband and wife had been married in New York and immediately established their marital domicile in the state of Kentucky, where the parties continued to reside until the wife became dissatisfied, when a written agreement was entered into between the parties touching a separation. Then the wife returned to New York and continued to reside there until the proceedings in controversy. The husband appealed to the Supreme Court and to the Court of Appeals of the state of New York, where the judgment was affirmed. The case was then taken to the Supreme Court of the United States on error.

In concluding its opinion the court used the following language:

"We are of the opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding upon her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

"To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause allowed, if it actually existed. The wife not being within the state of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that state, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the state in which she was found; and by the very fact of suing her he would admit that she had acquired a separate domicile (which he denied) and would disprove his own ground of action that she had abandoned him in Kentucky.

"The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky and that therefore their judgments must be reversed."

It will be observed from the foregoing that the court gave such conclusive effect to the Kentucky decree, where the wife was not personally served in the state of Kentucky and did not appear, that she was not permitted to recover either a divorce or alimony in the courts of New York.

In *Lynde v. Lynde, supra*, a divorced wife sued the husband in the courts of New York to satisfy a judgment for alimony awarded her in the courts of New Jersey. In New Jersey jurisdiction was acquired by substituted service, and after a decree of divorce was awarded, the wife applied for an award of alimony and notice was served on the husband

of the application in New York. The husband appeared by counsel to resist the application for alimony, which was subsequently awarded by the court. It was said by this court in the opinion:

"By the Constitution and the act of Congress requiring the faith and credit to be given to a judgment of the court of another state that it has in the state where it was rendered, it was long ago declared by this court: 'The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit.'"

Harding v. Harding, supra, was a suit by the husband in the courts of California to recover a divorce from the bonds of matrimony from the wife, who was a resident of Illinois. The ground of the application was the desertion and absence of the wife. The wife appeared and plead in bar a decree of the courts of Illinois where she was awarded in a contested case with her husband, a decree from bed and board, and alimony. The Supreme Court of the State of California held that the husband was entitled to a divorce. In reviewing the decree, this court used the following language:

"We are of the opinion that the final decree of July 26, 1897, entered in the circuit court of Cook county, Illinois, in legal effect established that the separation then existing, and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a wilful desertion by the wife of the husband. From these conclusions it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case, it follows that the Supreme Court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the constitution of the United States."

Sistare v. Sistare, supra, was an action in the courts of Connecticut to enforce an award of alimony to the wife in a suit for divorce from bed and board in the courts of New York. The Connecticut court refused to enforce the past due installments of alimony under the New York decree. This court, in reversing the Connecticut court, concluded its opinion as follows:

"If the judgment be an enforceable judgment in the state where rendered, the duty to give effect to it in another state clearly results from the full faith and credit clause, although the modes of procedure to enforce the collection may not be the same in both states.

"It follows that the judgment of the Supreme Court of errors of Connecticut must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

In the light of these cases, it is difficult to understand why the decree of the Chancery Court of Arkansas in the divorce proceedings is not conclusive against an additional recovery of alimony in the courts of Nebraska.

The judicial proceedings in the Chancery Court of Arkansas, interposed as a bar to the recovery of further alimony, are entitled to full faith and credit in the courts of Nebraska, notwithstanding Bates owned lands lying beyond the territorial jurisdiction of the Arkansas court.

The only reason urged why the award of alimony by the Chancery Court of Benton County, Arkansas, is not a bar to the recovery of further alimony in the courts of Nebraska is because the Arkansas court could not take the Nebraska lands into consideration in awarding alimony under the statutes of Arkansas. Whether that court could or did consider the Nebraska lands is not discussed in this connection. It is not claimed that the Arkansas court did not have jurisdiction of the subject matter of divorce and alimony and of the parties as administered under the laws of that state; nor is it claimed that it did not have authority

to award alimony; the theory of the amended petition and the Nebraska court is that the judgment for alimony awarded by that court was all the alimony it could have awarded under the laws of Arkansas, and was valid and conclusive between the parties in that state. It is urged, however, that under Section 2684 of Kirby's Digest of the Statutes of Arkansas, passed in 1893 (70), that the court could not consider Bates' Nebraska lands in awarding alimony and therefore the proceedings of that court plead as a bar to the recovery of further alimony in the courts of Nebraska do not have the same force and effect in the courts of the state of Nebraska that they have in the courts of the state of Arkansas under Section 1 of Article IV of the Constitution of the United States. This involves the right of the legislature of Arkansas to pass statutes in determining the manner and extent of awarding alimony by its courts, when the marriage relation is dissolved. It also involves the faith and credit due to judicial proceedings awarding alimony in accordance with these statutory enactments when drawn in question in the courts of Nebraska.

So far as we know, the right of the legislature of a given state to pass enactments regulating the subject of alimony has never been questioned. Historically speaking, the right to alimony on the dissolution of the marriage relation is of statutory origin in this country.

It is said in Vol. 1 Ruling Case Law, subject "Alimony," Sec. 70, that "permanent alimony in conjunction with an absolute divorce was entirely unknown to either the common or ecclesiastical law and is wholly a creature of statute."

2nd Nelson on "Divorce and Separation," Sec. 900, speaking to the same question, says:

"The power to grant the wife a permanent allowance after an absolute divorce is not derived from the common law and is not derived from the jurisdiction to grant divorce. The permanent alimony of the common law was granted to the wife upon a de-

cree of separation from bed and board; so that it is held that our statutes must confer upon our courts the power to grant the wife a permanent allowance after the dissolution of the bonds of matrimony. The statute must confer upon the court to provide some allowance for the wife, who is, by an absolute divorce, placed in a situation unknown at the common law."

2nd Bishop on "Marriage and Divorce," Sec. 1065, speaking upon this question, uses the following language:

"The alimony of marriage dissolution is a creature of statutes. But when a statute has created it, without specifically defining its nature, it takes the nature of the common-law alimony, wherefrom it differs only as to particulars for which the statute has made a different provision."

This doctrine is specifically recognized in *Green v. Green*, 49 Neb. 546 and *Brenger v. Brenger*, 142 Wis. 26.

The question of divorce and alimony is domestic and the state of the domicile of the parties has a special interest in the welfare of its citizens and of legislative control over the subject.

The following quotation from *Ditson v. Ditson*, 4th R. L. 87, illustrates this interest on the part of the state in the domestic relations of its citizens domiciled therein:

"It is obvious that marriage as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge, so far as its own citizens or subjects are concerned, and should be so deemed by other civilized and especially sister states; that a state cannot be deprived directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens by the fact that the subjects and citizens of other states, as related to them, are interested in that status; and in such a matter has a right under the general law judicially to deal with and modify or dissolve this re-

lation, binding both parties to it by the decree, by virtue of its inherent power over its citizens and subjects and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii*, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens."

The foregoing is quoted with approval in *Atherton v. Atherton*, 181 U. S. 155:

Most of the states, if not all of them, have enactments regulating the subject of alimony in the event of absolute divorce between citizens domiciled therein. This legislation varies in the respective states. The courts are supposed to conform to and be controlled by these enactments, when awarding alimony. If decrees awarding alimony in conformity with these enactments, are not conclusive on the parties in the courts entering such decrees and on the courts of other states, when drawn in question in such states, the finality of litigation on this subject has no end.

The Supreme Court of Nebraska recognizes that Arkansas had passed valid statutes on the subject of permanent alimony, in the event of an absolute divorce between citizens domiciled in that state. It also recognizes that the alimony awarded Bodie in the Chancery Court of Arkansas, was in pursuance to and in accordance with the statute of that state; but it holds that the decree awarding Bodie alimony in the court of Arkansas was not binding on the Nebraska court, because under the Arkansas statute, the Arkansas court could not consider Bates' Nebraska land. It therefore awards Bodie \$10,000 additional alimony. This is done in the absence of any statute in Nebraska authorizing it. It is made to rest on the superior sense of equity possessed by the Nebraska court to that possessed by the legislature of Arkansas or its chancery court.

If this may be lawfully done under the provisions of Section 1 of Article IV of the Constitution, the logical result would be that the judicial proceedings of another state are not binding on the courts of Nebraska in any case. If the Nebraska court may revise the judicial proceedings where the relief granted is regulated by and is rendered in accordance with a statute, it may revise the judicial proceeding, where the relief is awarded in accordance with the verdict of a jury or the decree of a court. The relief awarded by the verdict of a jury or the decree of a court does not evidence a higher standard of justice than when fixed or controlled by the deliberate enactment of a legislative body. If it may revise when the judgments of the courts of a sister state are inadequate, why may it not revise when the recovery is excessive? The opinion of the Nebraska court unsettles the conclusive nature of judicial proceedings in sister states, when drawn in question in its courts. It is fundamentally wrong. It disregards and renders of no avail the valid enactments of a sister state as well as the judicial proceedings in conformity therewith. It nullifies the provisions of Section 1 of Article IV of the Constitution. This section makes no distinction between judicial proceedings in which the relief is regulated and controlled by statute and judicial proceedings where the relief is the result of the verdict of a jury, or the discretion of a court.

Bodie elected to claim alimony in bulk under section 2681 and not a division of Bates' property under section 2684 of Kirby's digest of the statutes of Arkansas.

Arkansas had two statutes, providing for the wife in the event of a dissolution of the marital relations. One was Section 2681, the other 2684 of Kirby's Digest of the Statutes of Arkansas. The former provided for a bulk sum as alimony to be fixed by the discretion of the court. The latter provided that the wife should receive one-third of the personal property absolutely, and the use of one-third of the real estate

for her natural life. It was optional with Bodie to make claim under either of these statutes. In her cross-bill Bodie alleged the value of Bates' property, but described no personal property or real estate belonging to Bates in Arkansas, and only partially described his lands lying in Nebraska. Description of Bates' property was essential to a division of the property. The court could not divide the property, without being advised of its description, at least so far as Bodie was able to describe it. The prayer of the cross-bill was "that the court award her such alimony as the facts and law warrant, all to her proper or necessary relief" (56, 567).

Oregon, under a similar statute to that of 2684, Kirby's Digest, holds that description of the property was necessary.

Ross v. Ross, 21 Ore. 9.

Bamford v. Bamford, 4th Ore. 30.

The court awarded \$5111 in full alimony. This was a bulk sum and was in accordance with the allegations and prayer of the cross-bill. Bodie clearly waived any right she may have had to a division of Bates' property under Section 2684 of Kirby's Digest.

Prior to 1907 there was in force in Nebraska, Section 23, Chapter 35, Compiled Statutes 1905, which provided as follows:

"When the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery, committed by the husband, or misconduct or drunkenness of the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to her dower in his lands in the same manner as if he were dead; but she shall not be entitled to dower in any other case of divorce."

It also had in force a statute similar to Section 2681 of Kirby's Digest of the Statutes of Arkansas, which confided to the court the power to award such alimony to the wife

as from the circumstances of the case and the situation of the parties, the court in its discretion might deem equitable and just.

In *Tatro v. Tatro*, 18 Neb. 395, the court used the following language, touching the right of the wife to elect either to claim alimony or a dower interest in her husband's property:

"We therefore hold that a wife, on obtaining a divorce for the causes named, is entitled to dower in the lands of her husband if she so elect, and the same may be set off as a portion of her husband's estate to which she is entitled. But that if she do not demand her dower, and the court makes a division of the property of her husband in her favor in the nature of alimony, it will be held to include her dower right unless a contrary intention appears, and the decree will conclude the rights of the parties."

In *Walton v. Walton*, 57 Neb. 102, the court said with reference to this statute:

"In the first place the wife's prayer in her petition was for permanent alimony, and not that she might be, upon the dissolution of the marriage awarded a dower interest in her husband's lands; and she did not complain in the district court, nor does she here, that she was not given a dower interest. She must therefore be deemed to have assented to accept a sum of money equal in value to the dower as permanent alimony and in lieu thereof."

Michigan has a statute which preserves dower to the wife. Alimony is there allowed in addition to dower when circumstances seem to require it.

In *Friend v. Friend*, 53 Mich. 543, 19 N. W. 176, the court in the opinion used the following language:

"We think the alimony allowed absolutely should be increased from \$700 to \$1,000 of which \$200 must be paid within sixty days and the remainder in two annual installments. As her dower is a right of which we cannot deprive her, we shall not disturb the decree on that subject."

In *Wood v. Wood*, 59 Ark. 441, the plaintiff did what was done by Bodie in the divorce suit here drawn in controversy, alleged the value of the husband's estate and prayed alimony. She did not ask the benefit of the dower statute of Arkansas. The result was an award of alimony in the sum of \$33,000.00 which it was claimed was error, *not want of jurisdiction*, as is claimed in behalf of appellee. The court held it was not error. In the opinion the court says:

"She therefore has no right to complain in this court that she did not recover that which she neither asked for nor desired. Appellant did not undertake to show in her original bill for divorce that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than \$200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state."

The Chancery Court of Arkansas did Consider the Nebraska Lands.

It is true the trial court found that "said court of chancery did not take into consideration said lands (Nebraska lands) or their value nor their rental value in fixing said allowance" (alimony). We are not unmindful of the fact that this court will not ordinarily review the facts. Nevertheless, we think a brief review of the facts will aid the court in reaching its conclusion.

(1) Bates' Nebraska lands were made the basis of a claim for alimony in Bodie's cross-bill in the divorce court (56).

(2) Depositions of a number of persons were taken by the respective parties as to the value and rental income of the Nebraska lands, and were read in evidence on the

trial of the divorce suit without objection (Stipulation 67). (Depositions, 68, 69 and 75, 76). The chancellor called for expectancy tables (Shannon, 72), (Walker, 78).

(3) The decree of the divorce court awarded Bodie "\$5111 in full of alimony and all other demands set forth in the cross-bill" (64). One of the demands in her cross-bill was that she might recover alimony on the faith of these lands which she described (56).

(4) The question of the court's consideration of the Nebraska lands was argued to the court (McGill, 72).

(5) Lindsay, one of Bodie's counsel in the divorce suit, says:

"The Chancery Court having had jurisdiction of the person of Bates, I was of the opinion then and am now that it is the law of the state of Arkansas that it could enforce any order made against Bates, or any other litigant touching alimony" (cross-examination, 71).

McGill, another of Bodie's counsel, says:

"My investigation led me to believe that the court had no jurisdiction over the Nebraska land, but had jurisdiction over the person of Bates and jurisdiction to render any judgment he might decree" (72).

(6) Humphreys, the chancellor, who heard and tried the divorce case, testifies:

"The land was supposed to be in the name of his children, or in his name as trustee for the children. * * *. The decree for alimony was a lump sum of \$5111 in lieu of any interest that she might have or claim she might have for any sum. * * * The court had jurisdiction of the parties and held it had not of the land in Nebraska, but did have jurisdiction to consider its value in determining the amount of alimony" (76).

(7) Bates testified:

"It was claimed in the divorce suit that the Nebraska lands, or a material portion thereof, were held in trust by me for my children" (74).

(8) Walker, Bates' counsel in the divorce suit, testifies:

"The court announced that it was not a new proposition to him; that while he couldn't send an officer to Nebraska to lay off any part of the land by metes and bounds, as alimony, he had personal jurisdiction of each of them; and had jurisdiction to enforce any judgment which he might render; that his finding was, that the court had jurisdiction to consider Bates' Nebraska property in awarding alimony" (78).

(9) As against the foregoing, Heaslett, the clerk of the divorce court, testified:

"The opinion of the court at the conclusion of the divorce trial was rendered orally from the bench. I think he went into every phase of the case. I don't think the court took the land outside of Benton county into consideration. I know what the court said and I have stated my recollection of it. It is my recollection that the rental value of the Nebraska land and what it had produced for several years, was put in evidence. I remember that the chancellor announced that while he did not have jurisdiction over the lands in Nebraska, he did have jurisdiction over the person of Bates as he was personally present in court (69).

(10) Lindsay, one of Bodie's counsel in the divorce suit, testified:

"The court held that it had no jurisdiction of the real estate in another state; that he could not determine the question of the real estate in Nebraska, because the evidence disclosed that the children of Judge Bates held a deed to a portion of that property in Nebraska, and they were not parties to the suit. He said he did not have jurisdiction to take the land into consideration or its value" (71).

(11) Shannon, one of Bodie's counsel in the divorce suit, testified:

"There was a controversy by respective counsel whether the court had jurisdiction to consider Bates' York County land, and as I understood the court, he held that he could not consider the Nebraska land" (71).

(12) McGill, another of Bodie's counsel in the divorce suit, testified:

"I remember in delivering his opinion he had considerable to say about the land, but I cannot recall all of it. I remember that the matter of title was in issue and he stated that if he considered that he would have to pass on the title, among other things, and that he had no jurisdiction over the title of the land" (72).

(13) Davidson testified:

"The judge stated that he would enter the amount of \$5111 as the allowance by agreement, and I objected to that entry being made by agreement. The judge then stated he would enter the decree by the consent of the plaintiff (Bates) upon condition that Bodie would not appeal. There was nothing said about figuring Bates' interest in the rental value of the Nebraska lands. The judge had excluded that entirely" (73).

(14) Section 2684 of Kirby's Digest of the Statutes of Arkansas, passed in 1893, was placed in evidence which provides the wife on recovery of divorce should recover one-third of the husband's personal property absolutely and one-third of the real estate for life (70).

(15) Section 2681 of Kirby's Digest of the Statutes of Arkansas, passed in 1837, was put in evidence, which authorizes the court on entering a decree, to make such order touching the alimony of the wife as shall be reasonable from the circumstances of the parties and nature of the case (78).

That the court did not have jurisdiction of the Nebraska lands was conceded by the chancellor at the trial. Out of this concession, no doubt, grew the impression that the chancellor said he had no jurisdiction to take the Nebraska lands into consideration in awarding alimony. No one knew, or could know, what the chancellor in fact took into consideration but the chancellor himself. That the chancellor stated he had jurisdiction of the parties and power to enforce any order he might make, is conceded by two of Bodie's counsel and this concurs with the testimony of the chancellor and Walker. That the

chancellor had authority to consider the Nebraska lands in awarding alimony, under its general equity powers, as well as under Section 2681 of Kirby's Digest of the Statutes of Arkansas must be conceded. True, the Supreme Court of Nebraska in its opinion, holds that Section 2681 applies only to cases where the husband recovers the divorce and Section 2684 to cases where the wife recovers. It bases its holding on *Pryor v. Pryor*, 88 Ark. 302. At the time the opinion in that case was written, Section 2681 of Kirby's Digest had been in force 70 years. It was the only statute providing alimony in *any* case for more than 50 years before Section 2684 of Kirby's Digest was passed. Yet the Arkansas court was struggling in *Pryor v. Pryor* over the question whether the court had authority to award a guilty wife alimony under any circumstances. The court reviewed the authorities generally on the subject and reached the conclusion that the language of Section 2681 of Kirby's Digest was broad enough to authorize the divorce courts of that state to award alimony to the wife "*in any case*." The Nebraska court makes this quotation from *Pryor v. Pryor*.

"Similar statutes in other states have been construed to *enlarge the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife.*"

The court approved this construction in *Pryor v. Pryor*.

The inference of the Nebraska court could not be legitimately drawn from this language that section 2681 applied only when the husband secured the divorce. If this section (2681, Kirby's Digest) "enlarged the powers of courts in divorce cases so as to empower them to allow alimony *in any case*," why not in the Bodie-Bates divorce case? That fell within the terms of "*any case*" and clearly within the language of that statute. So that out of the mouth of the Nebraska court its application of Sections 2681 of Kirby's Digest is condemned.

Then again, Section 2684 of Kirby's Digest calls for a division of the personal property, one-third to the wife and two-thirds to the husband. It also provides that the wife shall have one-third of the husband's real estate for life. If it can not be divided, it provides that it shall be sold and the proceeds divided. That part of the divorce decree which relates to alimony does not comply with this statute; it provides a bulk sum for \$5111 as alimony for the wife. If this statute was jurisdictional, where was the authority for a bulk sum as alimony? The court also required Bates to secure this bulk sum. Where was the authority for this?

Section 2684 did not authorize the court to compel Bates to buy his own property on a spot cash basis and to secure the purchase price. If section 2684 of Kirby's Digest was so elastic as to permit the court to award Bodie a bulk sum as alimony and compel Bates to secure it, why was it not sufficiently elastic to permit the court, in making up the bulk sum, to consider the Nebraska lands? The fact is that the court did consider the Nebraska lands and included that consideration in the bulk sum. Bates held the Nebraska lands in trust for his children by a former wife. His interest was but a life use. He was an old man and his life use had little value. Whether the divorce court considered the Nebraska lands in fact or not is wholly immaterial, because a failure to do what it had unquestioned power to do, in no way affects the divorce decree as a bar to this suit for further alimony under the full faith and credit clause. If Bodie was dissatisfied with the bulk sum awarded as alimony by the divorce court, her remedy was an appeal to the Supreme Court of Arkansas. This she waived, and thereby the award of alimony by the divorce court became *res adjudicata*, and conclusive on her not only in the courts of Arkansas, but in the courts of Nebraska as well.

Some Questions Discussed in the Opinion of the Supreme Court of Nebraska.

It seems to be the opinion of the Supreme Court of Nebraska that the question tried in the divorce court was not identical with the question in the Nebraska court, and therefore that the decree of the divorce court is no estoppel to the award of additional alimony in the courts of Nebraska. There were but two questions before the divorce court. One was, who should have the decree of divorce. The other was, the question of alimony. Both of these questions were passed upon; and Bodie was awarded the divorce, and given "§5111 in full of alimony and all other demands in the cross-bill." The Nebraska lands were presented in Bodie's cross-bill to the divorce court, as the basis of alimony. Both parties took a large amount of evidence as to the value and rental income of the Nebraska lands. This evidence was received by the court, and the question of the right of that court to consider the Nebraska lands, or their value, in awarding alimony, was argued to the court (68).

The present suit was instituted to recover additional alimony, presumably because Bates owned Nebraska lands, although it is not asked that she recover the use of one-third of the Nebraska lands for her natural life, which was the measure of her recovery, under Section 2684 of Kirby's Digest of the Arkansas Statutes. The identity of the issue, however, must be admitted, because the alimony if she is entitled to any, is because of Bates' ownership of the Nebraska land.

The court in its opinion, refers to the decree of the trial court, and then says:

"If he erred at all, it was in not allowing Bodie more than \$10,000" (50).

If we assume that Bodie was 53 years old at the time of the trial in the divorce suit, her expectancy, according to the mortuary tables, would have been 18.8 years—call it 19 years. Her evidence on the trial tends to show that the

rental value of the Nebraska lands did not exceed \$4.00 per acre (68). There were 320 acres of this land. The evidence tends to show that Bates' children were the real owners of all or a portion of the lands, but assume that Bates owned all the land. Then, the rental income from the lands at \$4.00 per acre would be \$1280 per annum. Bodie, if entitled to one-third of this income, would be entitled to \$426.66 per annum during her 19 years of expectancy. The present worth of \$426.66, payable annually for 19 years at 7 per cent which is the legal rate in Nebraska, would be \$4,407.40 or at 6 per cent it would be \$4,940.66. In other words, that \$10,000 additional alimony allowed in the decree of the Nebraska court, is more than twice the amount that could have been allowed under Section 2684 of Kirby's Digest of the Statutes of Arkansas.

It is also said at page 44 of the record that Bates is estopped to deny Bodie the right to recover additional alimony in the courts of Nebraska because he contended in the divorce court that that court had no jurisdiction to take the Nebraska lands into consideration in awarding alimony. If this were true, why is Bodie not estopped to claim additional alimony because she maintained in the divorce court that that court had jurisdiction to take the Nebraska land into consideration.

Estoppel because of this fact was not pleaded in the amended petition nor in the reply, nor was the question raised in the trial court. It is necessary to plead estoppel in order to make it available. This was not done.

In 10th Ruling Case Law, p. 842, under the title of "Estoppel," the author lays the rule down as follows:

"The general rule now obtaining, however, is that estoppel to be available on the trial must be specially pleaded, where there has been an opportunity for so doing."

The author has collected some 30 cases in support of this proposition. The principle is sustained by numerous adjudications in Nebraska:

Henderson v. Knutzen, 56 Neb. 460.

Boles v. Ferguson, 55 Neb. 565.

Erickson v. Bank, 44 Neb. 622.

Seroggin v. Johnston, 45 Neb. 714.

This question was not mooted in the trial court nor in the briefs in the Supreme Court. It was the invention of the court.

As to whether the divorce decree was entitled to full faith and credit in the courts of Nebraska, the Supreme Court of Nebraska in its opinion at page 50 of the record dismissed that question with this comment:

"Nor is there any merit in the contention that the decree in this case does not give full faith and credit to the judgment of a sister state."

At page 46 of the record, the Supreme Court of Nebraska finds the items of which the \$5111 in full of alimony and all other demands in the cross-bill, is comprised. No such finding was made by the trial court. The Supreme Court of Nebraska was not a tryer of fact. Its sole duty as a reviewing court was to affirm or reverse the decree of the trial court on legal grounds. Not only so, but this finding of the Supreme Court of the items which went into the divorce decree, if supported by any evidence, is inconsistent with the divorce decree. Parol evidence is admissible to explain the precise question passed upon by a court, where there is doubt from the language of the decree, what questions were in fact passed upon. The language of the decree of the divorce court is clear, specific, and leaves no room for parol evidence to explain the issues that were tried by the divorce court. If, however, there was any doubt, from the divorce decree itself, it was the duty of the trial court to make the findings of fact, and not the Supreme Court of the State of Nebraska.

CONCLUSION.

There is no legal principle which sustains the judgment of \$10,000 as additional alimony. Bodie elected to submit her right to divorce and alimony to the Chancery Court of Benton County, Arkansas. She claimed alimony on the faith of Bates' ownership of the Nebraska lands, which in fact he did not own, but held in trust for his children by a former marriage. She was heard as to its value and rental income. She recovered a divorce and was awarded \$5111 in full alimony and all other demands. She waived the right of appeal and accepted the alimony awarded. She then ceased to be the wife of Bates. She assumed her maiden name. Bates was no longer under obligation to support her. No precedent can be produced which justifies a recovery of further alimony in the court of Nebraska. Her contention that the divorce court had no jurisdiction to consider the Nebraska lands in awarding alimony conflicts with the well known equitable powers possessed by the divorce court.

In any event, the state of Arkansas had the right to limit the recovery of alimony in the courts of that state. Such limitation, if true, would not prevent the judgment rendered in conformity therewith from being entitled to full faith and credit in the courts of Nebraska. When full faith and credit is given, the divorce decree it is a bar to the recovery of further alimony in the courts of Nebraska.

It results that the Nebraska court erred in holding that the amended petition stated a good cause of action, and that the divorce decree was not a bar to the suit for further alimony.

Respectfully submitted,

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W. L. KIRKPATRICK,

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of counsel*



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Number [redacted] 120

IN THE

Supreme Court of the United States

October Term, 1916.

EDWARD BATES, PLAINTIFF-IN-ERROR,

VS.

LUCIE BODIE, DEFENDANT-IN-ERROR.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES.

REPLY BRIEF OF THE PLAINTIFF-IN-ERROR.

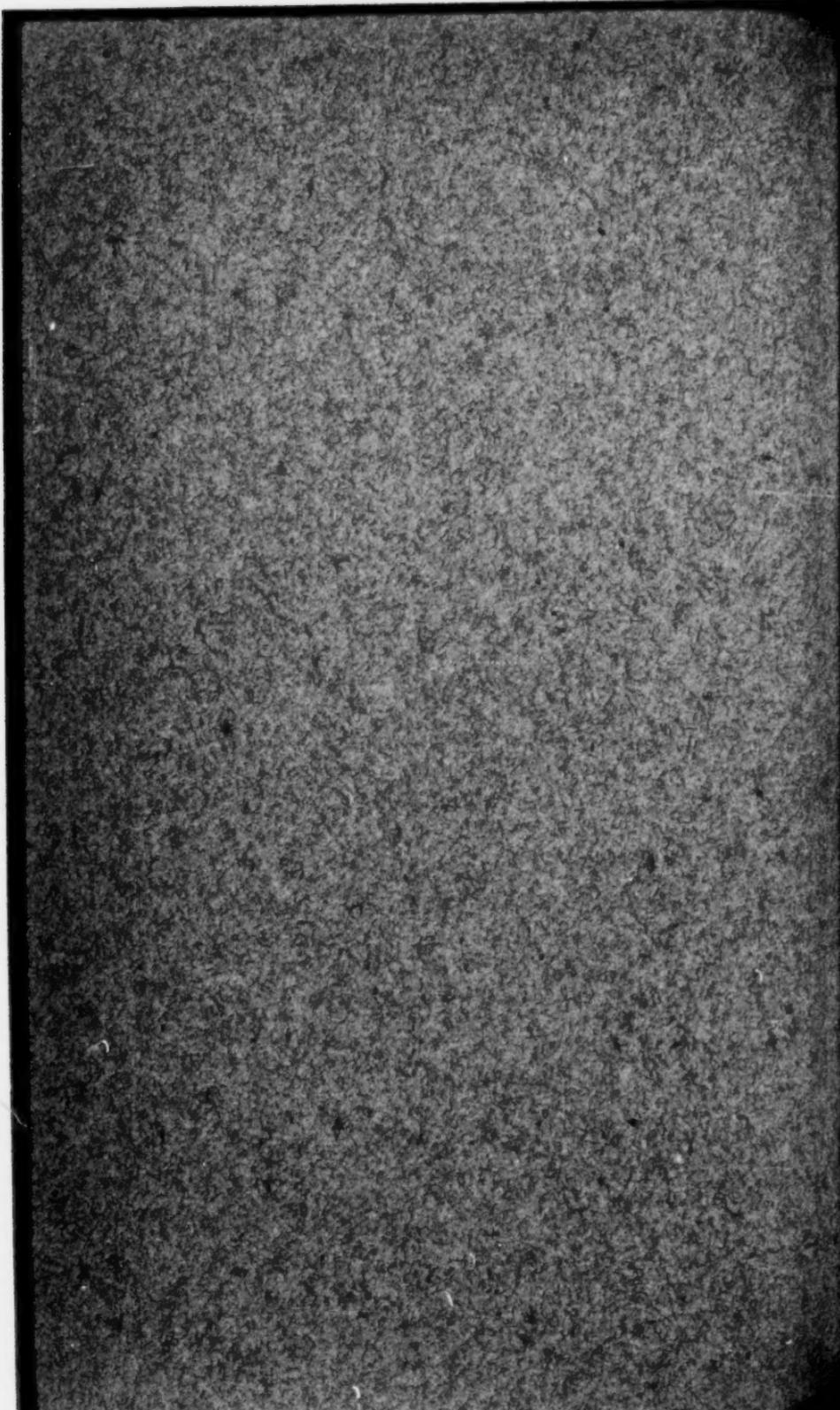
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Number 406.

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LUCIE BODIE, DEFENDANT-IN-ERROR.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES.

REPLY BRIEF OF THE PLAINTIFF-IN-ERROR.

FIELD, RICKETTS & RICKETTS,

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JURISDICTION OF THIS COURT.

At pages 33 to 39 of Bodie's brief the jurisdiction of this court to review the alleged errors presented by the record is again drawn in question, but on a different ground from that asserted in the motion to dismiss or affirm.

The contention, as we understand it, is now based on the fact that the validity of sections 2681 and 2684 of Kirby's Digest of the Statutes of Arkansas is not questioned, and that the Nebraska court's conclusion is made to rest on the construction of these statutes, which it is urged does not present a question for review in this court.

It is admitted the validity of these statutes is not questioned by Bates. It may also be admitted that the Nebraska court in a large measure rested affirmation of the judgment upon its construction of these statutes, but we deny the conclusion that is sought to be drawn therefrom.

The third defense in the answer of Bates is that the Arkansas court had jurisdiction of the parties and subject-matter, and that the decree divorcing Bodie from Bates, restoring her maiden name and awarding her \$5111 in full of alimony, was a bar to the recovery of further alimony in the courts of the state of Arkansas, and, under the full faith and credit clause of the constitution, a bar to the recovery of further alimony in the courts of Nebraska (pp. 19-21). This was the chief defense on which Bates relied. The facts alleged in this defense are either admitted or conclusively established in the record. The alimony awarded in the decree was paid by Bates and received by Bodie (p. 70). The only reference to this defense in the opinion of the Supreme Court of Nebraska is in the following words:

"Nor is there any merit in the contention that the decree in this case does not give full faith and credit to the judgment of a sister state." (P. 50.)

The effect was a denial of the validity of this defense in the Nebraska court's ruling on the demurrer and in the judgment on the merits, which was duly affirmed. The denial of the validity of this defense constitutes the only assignments of error for the consideration of this court. The validity of the

Arkansas judgment is not questioned by Bodie, nor is the fact that it is conclusive against the recovery of further alimony in the courts of Arkansas questioned. Bodie not only accepted the pecuniary fruits of the Arkansas decree, but adopted her maiden name, to which she was restored by that decree, and instituted the present suit in her maiden name. The decree is made a part of her amended petition and in the amended petition she prays "for alimony to which she is entitled in addition to the said amount so allowed in and by said Court of Chancery of Benton County, Arkansas." (P. 5.)

We have, then, a valid Arkansas decree divorcing Bodie from Bates, restoring her maiden name and awarding her \$5111 in full of alimony, which constitutes a conclusive bar to the recovery of further alimony in the courts of the state of Arkansas, interposed as a bar to the recovery of additional alimony in the courts of the state of Nebraska, under the full faith and credit clause of the constitution. This bar was relied upon by Bates exclusively as a complete defense to the action of Bodie in the courts of Nebraska, to recover additional alimony. The Nebraska court could not defeat Bates' right to have the denial of the validity of this defense reviewed in this court by resting its decision on grounds other than that plead by Bates.

The necessary operation of the judgment of the Nebraska court is to deny to Bates the benefit of the full faith and credit clause of the constitution, which guarantees to him that if the Arkansas court had jurisdiction of the parties and the subject-matter and the decree was conclusive in the Arkansas court, it should also be conclusive in the courts of the state of Nebraska. The fact that the Nebraska court may have rested its conclusion that the Arkansas decree did not constitute a bar to Bodie's right to recover further alimony in Nebraska on its construction of the Arkansas statute, does not change the

fact that it results in the denial to Bates of the benefit of the full faith and credit clause of the constitution.

The citation of the authorities of our adversary in support of his contention that this court has no jurisdiction, has no application to the issue raised in the instant case.

West Chicago St. Ry. Co. v. Ill., 201 U. S. 506.

C. B. & Q. Ry. Co. v. Ill., 200 U. S. 561.

Green Bay, etc., v. Patten Paper Co., 172 U. S. 58.

Roby v. Colchour, 146 U. S. 153.

Atherton v. Atherton, 181 U. S. 155.

Andrews v. Andrews, 188 U. S. 14.

In *West Chicago St. Ry. v. Illinois, supra*, the city of Chicago brought mandamus in the state court to compel the street railway company at its own expense to lower its tunnel under the Chicago River to meet the increased demands of navigation. The railway company for defense relied on the contract clause and the due process clause of the constitution. The state court rested its judgment, however, upon grounds of local and general law, and not on the constitutional defense itself.

The jurisdiction of this court to review the judgment of the Illinois court was questioned. In sustaining its jurisdiction the court says:

"The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court can not be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation—although the opinion of the state court does not expressly refer to the constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city can not, in any view of the case, be granted consistently either with the contract clause of the constitution or with the clause prohibiting the state from depriving anyone of his property without

due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the federal questions raised covered the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment by its necessary operation, denied the company's claims based on the constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument."

In *C. B. & Q Ry. Co. v. Illinois, supra*, the jurisdiction of this court to review the judgment entered in the Illinois court was questioned for similar reasons, but this court held that it had jurisdiction, and in speaking to this question in the opinion the court used the following language:

"Undoubtedly the general rule is that where the judgment of a state court rests upon an independent, separate ground of local or general law, broad enough, or sufficient in itself, to cover the essential issues and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case."

In *Atherton v. Atherton, supra*, which involved the subject of divorce and alimony, the husband obtained a decree in the state of Kentucky on constructive service and without appearance on the part of the wife. Pending the husband's suit in the Kentucky court, the wife brought suit for divorce and alimony in the courts of New York, where she was residing. The husband appeared and defended in New York against the

wife's action in the New York court. The defense was based on the bar of the Kentucky decree, under the full faith and credit clause of the constitution.

The New York court held the Kentucky decree was void for want of jurisdiction on the part of the Kentucky court, and divorced the wife from the husband, and awarded her alimony. The decree was affirmed by the court of appeals.

While the question of the right of this court to review the New York decree in favor of the wife was not formally raised, yet it was necessarily involved. Nevertheless, this court entered upon inquiry for itself as to whether or not the Kentucky court acquired jurisdiction over the wife and the validity of its decree.

This court held, after a full analysis of the statutes and the law applicable thereto, that the husband's decree in Kentucky was valid; and under the full faith and credit clause of the constitution was a complete defense to the application of the wife for divorce and alimony in the courts of the state of New York.

In *Andrews v. Andrews, supra*, which involved the validity of a South Dakota decree of divorce procured by the husband, the courts of Massachusetts held the South Dakota decree void for want of a *bona fide* residence on the part of the husband in the state of South Dakota.

The jurisdiction of this court to review the Massachusetts judgment was expressly questioned on the ground that the Massachusetts court had correctly decided the question involved and therefore there was no federal question for review. The court, however, notwithstanding that fact, maintained that it had jurisdiction; and in speaking to this question, said:

"It was suggested at bar that this court was without jurisdiction. But it is unquestionable that the rights

under the constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed, we think it is apparent that it but asserts that as the court below committed no error in deciding the federal controversy, therefore there is no federal question for review. But the power to decide whether the federal issue was rightly disposed of involves the exercise of jurisdiction."

Not only was the effect of the judgment of the state court a denial to Bates of the benefit of the full faith and credit clause of the constitution, but the ground on which it was rested was not in itself sufficient to warrant the Nebraska judgment. The Arkansas statutes are conceded to be valid. This being true, whatever their proper construction, they measure the authority of the courts of that state to award alimony when a wife is granted an absolute divorce from her husband, while a citizen of and domiciled within that state. It necessarily follows that a judgment for alimony, based on these statutes and binding between the parties in that state, is such a judgment as falls within the constitutional guaranty of full faith and credit when drawn in question in another state (see Bates original brief, pp. 35-39).

If the contention of our adversary is correct, then it is possible for the state court to deprive a litigant of the benefit of a constitutional right and by resting its decision on ground other than the constitution, deprive this court of jurisdiction to review the decision of the state court at the same time.

BODIE'S EQUITIES.

The fourth proposition considered in our adversary's brief at pages 44-47 relates to Bodie's equities, so called.

After quoting a considerable paragraph of Bodie's amended petition, our adversary refers to the paragraph quoted in the following words:

"This allegation is not even denied in the answer, and the general finding of the court below in favor of this plaintiff (defendant in error) also finds this allegation to be true."

Counsel seems to have labored under a mistake of fact with reference to the answer. The first paragraph of the answer, after making admissions of several different allegations contained in the amended petition, concluded with these words:

"And denies each and every other allegation set forth and alleged in plaintiff's petition, except as may be hereinafter expressly admitted or modified." (R., p. 18.)

The text of the paragraph quoted by our adversary from the amended petition was not admitted in the answer, either prior or subsequent to the general denial. Neither was the paragraph quoted from the amended petition a material allegation. There is not a word of evidence in the entire record which supports or tends to support the paragraph alleged to constitute Bodie's equities. It is therefore not quite apparent how the Nebraska court could have found that these immaterial allegations constituting Bodie's equities were true.

The so-called general finding by the trial court consists of these words:

"The court being now fully advised in the premises finds for the plaintiff and against the defendant." (R. 37.)

The court then proceeds to make findings of the material allegations contained in the amended petition. This so-called general finding does not find the "*issues*" in favor of the plaintiff and against the defendant; neither does it find that the "allegations" of the amended petition are true. In short, it is not a finding of fact at all. It is a mere conclusion of law, if anything. It may be doubted whether it performs any function in the judgment of the Nebraska court.

In *Ganow v. Denny*, 68 Neb. 706, the court made a finding that—

“there are no equities with the defendants and that all the equities are with the plaintiffs.”

The court held that this would not constitute a finding of fact, but was a conclusion of law. Speaking to this question, it is said in the opinion:

“There is but one finding of fact in the record, namely, that the plaintiff is and has been the owner of the fence in question, situated on government land. The finding that the equities are with the plaintiff and not with the defendants, is purely a conclusion of law, and standing alone, would not support a judgment. It is in effect, no more than saying the court finds that the plaintiff is entitled to recover.”

The finding in controversy does not pretend to be a general finding of fact, nor that the allegations of the amended petition are true, nor that the court finds the issues made in the pleadings in favor of Bodie.

ESTOPPEL.

The question of estoppel is considered in Bodie's brief at page 43. This subject was anticipated in our original brief at page 49. The authorities cited do not seem to be in point in this—in each instance the position assumed and constituting the basis of the alleged estoppel was based on facts assumed by the litigant in his pleading or otherwise, which became a part of the record in the suit.

In the instant case, the original position said to have been assumed consisted in the oral argument of counsel on a legal question in the trial of the divorce suit. We do not think that a *position assumed by counsel in the oral argument of a law question* can be made the basis of an estoppel so as to bind the client from assuming a different position on a different

phase of the law in a subsequent suit. If a client can be estopped by the position his counsel assumes in his oral argument on a question of law, the client is in continuous peril lest counsel may jeopardize his substantial rights. Not only so, but counsel may and ought to be liable to his client for any substantial right jeopardized in his oral argument, if such be the law.

There is no merit in the so-called estoppel.

BAR OF DIVORCE DECREE.

Russell v. Place, 94 U. S. 606, and *Slater v. Skirving*, 51 Neb. 108, are cited at pages 50 and 51 of Bodie's brief, and also cited in the opinion of the Supreme Court of Nebraska (R. 48), for the purpose of showing that the divorce decree is not a bar to the present suit, "unless it appear, either on the fact of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit, that is raised in this."

These citations do not correctly state the rule applicable to the case now before the court, and are to a certain extent misleading when applied to the instant case. The rule stated in these citations is correct when applied where the parties and the subject-matter are the same, but the *suit is founded on a different claim or demand from that put in issue in the original suit*: but when the judgment plead in bar is rendered in an action between the same parties and not only involves the same subject-matter, *but the same claim or demand as in the original suit*, the bar or estoppel is much broader and is a finality between the parties in any future suit.

This broader rule is stated by Field, J., in *Cromwell v. Sac County*, 94 U. S. 351 (24 L. Ed. 197):

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

See also:

Stout v. Lye, 103 U. S. 66.

Nisbitt v. Independent Dist. of Riverside, 144 U. S. 610.

If, then, the parties and the claim or demand were the same, touching alimony, in the divorce suit and in the instant suit now before the court, the bar or estoppel of the divorce decree is a finality between the parties on the claim or demand now in controversy. Whether the claim or demand in the divorce suit and in the suit now before the court were the same, must be determined from the record.

An examination of the record will show that Bodie in her cross-bill in the divorce suit in the Chancery Court of Arkansas set forth Bates' ownership of the Nebraska land as a basis of alimony in the following words:

"The said Lucy Bates further shows that the said Edward Bates is the owner of real and personal property of the reasonable and fair value of \$75,000.00, consisting of 320 acres of land in York Co. Neb. described as follows, to-wit: the S. W. $\frac{1}{4}$ in section 7-8 also town lots in Custer, Oklahoma; and she further shows that about the year 1902 she became the owner in her own and separate right of \$3,000.00 in money and shortly after she loaned

\$2,500.00 of the same to her husband, taking his notes therefor bearing interest at the rate of 8 per cent per annum." (P. 56.)

Her cross-bill concluded with the following prayer (pp. 56-57) :

"The premises being considered the said cross-complaint prays that the bonds of matrimony heretofore entered into between herself and the said Edward Bates be dissolved, and that he be required to restore to her said sum of **\$2,500.00** so borrowd from her and 8 per cent interest thereon since July 1st, 1902, and that the court award her such alimony as the facts and law warrant, and all to her proper or necessary relief."

On the trial of the divorce suit Bodie offered the evidence of eight witnesses tending to show the value and the rental income of the Nebraska lands, to enable the court to determine the amount of alimony she should recover on account of these lands (R., pp. 68-69). The decree in the divorce suit awarded alimony to Bodie in the following words:

"It is ordered, adjudged and decreed by the court that the defendant Lucie Bates (Bodie) have and recover of and from the defendant Edward Bates the sum of **\$5111.00** in full of alimony and all other demands set forth in cross-bill." (R., p. 64.)

Bodie's amended petition in the suit now before the court attached a copy of the divorce decree of the Arkansas court and made it a part thereof (R., p. 5).

The prayer of Bodie's amended petition in this suit is in part as follows:

"That on a full and final hearing herein this court will grant, allow and adjudge and decree to this plaintiff a reasonable sum out of the value of the defendant's property located in York County, Nebraska, and above described (being the same description as in her cross-bill in the divorce suit) as and for alimony, to which she is

entitled, *in addition to said amount so allowed in and by the said court of chancery of Benton County, Arkansas.*" (R., pp. 5 and 6.)

The italics are ours.

These references to the record clearly show that Bodie's cross-bill in the Arkansas divorce suit and her amended petition in the suit now in controversy each based the right to alimony on Bates' Nebraska land. In other words, the demands in the two suits are identical, so far as alimony is concerned. There is no dispute that the parties are the same, although Bodie brings the suit now in controversy in her maiden name. Bodie also, in the suit now in controversy, offered the same evidence by the same witnesses to show the value and rental income of the Nebraska land as a basis of recovery, that she offered in the Arkansas divorce suit. This appears from the stipulation of the parties in the record (p. 67).

The parties in both suits are the same, and the claim or demand in both suits is the same, therefore the decree in the Arkansas suit was and is a finality between the parties, touching the subject of alimony: not only as to what was in fact litigated in the divorce suit, but what could have been litigated and determined in that suit. Whether the chancery court of Benton County, Arkansas, took the Nebraska land into consideration in awarding Bodie alimony or not, is immaterial, because it could have taken those lands into consideration, and its decree is as much a finality between the parties as though it did in fact consider the Nebraska lands.

This question was considered in our original brief and will not be repeated here (pp. 18-25).

Since the original brief was prepared, the Supreme Court of Arkansas has ruled that the chancery court of that state may determine the rights between litigants over whom it has

jurisdiction as to lands lying without the state and may compel conveyances accordingly. *Fegan v. Anderson*, 194 S. W. 234.

Whether the Chancery Court of Benton County, Arkansas, considered the Nebraska lands in awarding alimony is a matter in dispute. The chancellor himself testifies that the Nebraska lands were considered and he alone knew what was in the mind of the court. The decree rendered is in harmony with the chancellor's testimony, and we think the attempt to controvert the fair inference contained in the decree, corroborated by the chancellor's evidence, was unjustifiable.

Respectfully submitted,

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JAMES B. WAINER
CLEVELAND

IN THE
SUPREME COURT
OF THE
UNITED STATES

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EDWARD BATES, FLAUNTING IN DERBY

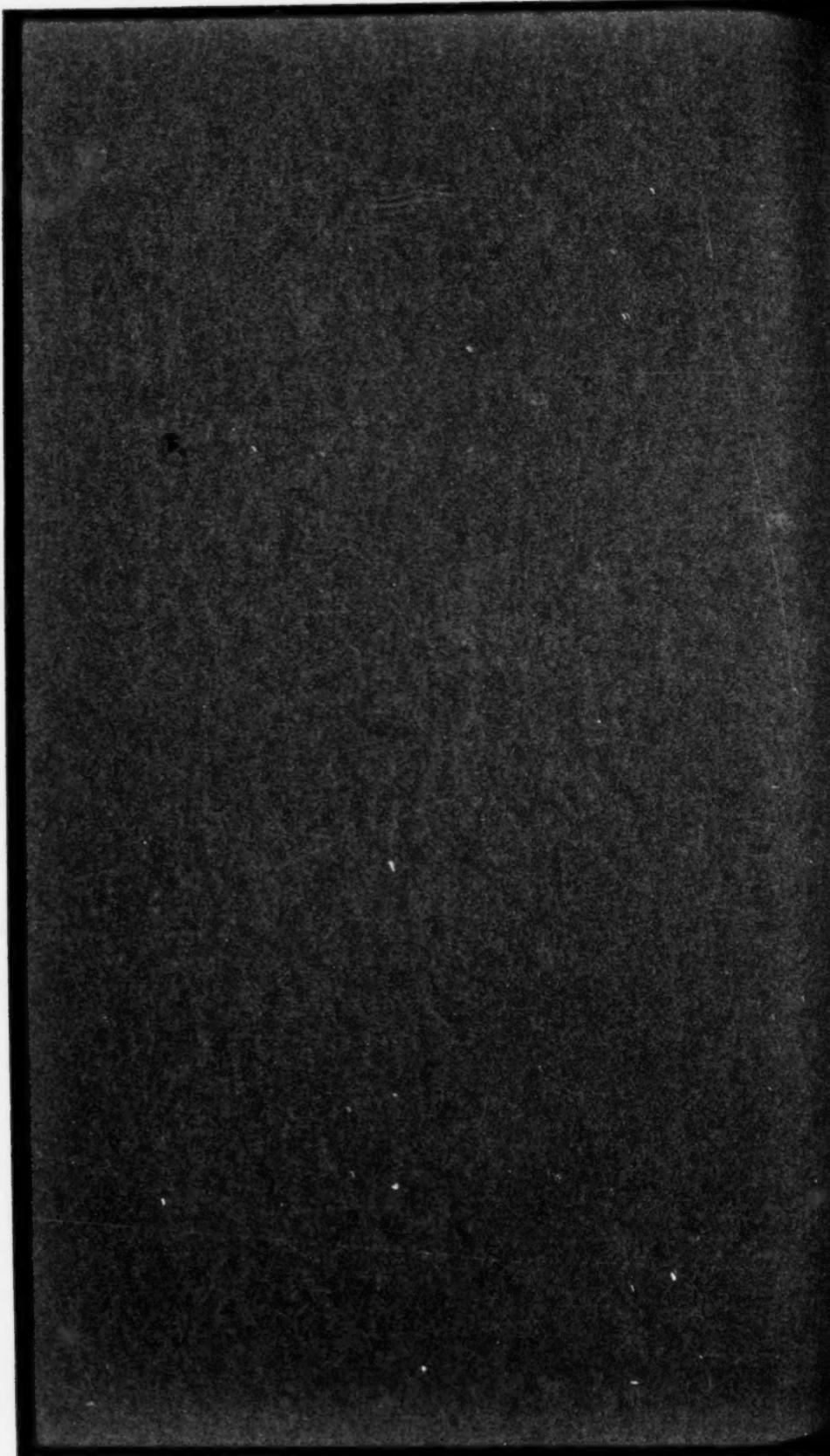
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LUCILLE BODIE, DEFENDANT IN ERROR.

1985 年 9 月 1 日 - 1986 年 8 月 31 日

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AMUM, P. 1990. *Journal of the Royal Statistical Society, Series B*, 48, 113-130.



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Number 406.

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1916.

EDWARD BATES, PLAINTIFF IN ERROR,
VS.

LUCILE BODIE, DEFENDANT IN ERROR.

ERROR OF THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF DEFENDANT IN ERROR.

FIELD, RICKETTS & RICKETTS AND W. L. KIRKPATRICK,
Attorneys for Plaintiff in Error.

SAMUEL P. DAVIDSON, *Attorney for Defendant in Error.*

STATEMENT.

This suit was brought in the district court of York county, Nebraska to recover additional alimony, by the defendant in error, against the plaintiff in error, her former husband. The petition upon which the cause was tried in that court was filed on the 24th day of November, 1911. After the filing of this petition, the defendant therein, this plaintiff in error,

filed a demurrer thereto, and upon consideration thereof, said district court sustained it, and dismissed the petition. The defendant in error, the plaintiff therein, prosecuted an appeal to the supreme court of Nebraska, where, after due consideration after the hearing, the judgment of said district court was reversed, the petition held to state a good cause of action, and the cause remanded to said district court for further proceedings in accordance with law. This plaintiff in error the defendant in the suit, then filed his answer to said petition; to which a reply was filed and the cause tried in said district court upon the merits, and on the 13th day of January, 1915, a decree was entered in favor of this defendant in error for the sum of ten thousand (\$10,000.00) dollars and costs. This plaintiff in error thereupon prosecuted an appeal to the supreme court of Nebraska in which court after a full hearing, the said judgment of the district court was affirmed, and an order to that effect was entered in said supreme court on the 15th day of January, 1916. (See 39 and 40 of the printed record.) This plaintiff in error thereupon, has prosecuted his petition in error, herein, to that court.

We think the most satisfactory way to state to this court the issues involved herein, is to insert in our brief copies of the petition answer and reply filed in said district court.

The petition is found, commencing at page 2 of the printed record and, omitting the title, verification and signatures, it is in the words and figures following, to-wit:

“And now comes said plaintiff and for her amended petition herein, alleges that she is, and ever since April 1st, last, has been a resident of Johnson County, Nebraska; that prior to March 1st, 1911, and for several years she has been a resident of Benton County in the state of Arkansas. In the month of January, 1889, while being a resident of York county in the State of Nebraska, she was married to defendant and after her said marriage and up until the commencement of the suit below mentioned, she conducted and demeaned herself towards said defendant in a dutiful, chaste and wifely manner. Soon

after her said marriage to defendant, he became addicted to drinking intoxicating liquors to excess and would very frequently get drunk and go off on a drunken spree, and this plaintiff would be compelled to and did, send after him and frequently have him brought home in a drunken condition, and filthy, and plaintiff be compelled to clean up the furniture and clothing soiled by the filth he would produce and plaintiff did so clean up after him very often, and this habit of defendant continued to grow worse, and his drunken sprees became more frequent, as the time passed, but this plaintiff continued to do her duty in her attempts to take care of defendant, and used her best endeavors to persuade and induce this defendant to cease his drunken sprees, but without avail. During such drunken sprees he became very abusive and would use coarse and indecent language to and in the presence of this plaintiff until her position became almost unbearable.

"Sometime before the 1st day of March, 1911, while plaintiff and defendant were living in Benton county in the State of Arkansas, without any just cause therefore, this defendant commenced a suit against this plaintiff in the court of chancery of Benton county, Arkansas, for divorce upon the alleged grounds of indignity, cruelty and infidelity. On being served with summons in that cause this plaintiff as defendant in that cause, filed her answer and cross-complaint, or cross-bill, in which she denied the allegations in the bill or complaint of the plaintiff in that cause, and alleged as grounds for her prayer for a divorce and allowance of and for alimony, the facts of said plaintiff's drunkenness and his cruel and unmanly treatment of this plaintiff, the defendant therein, amounting to gross indignity and alleging in general terms the amount and value of the property of the plaintiff in that suit. Among other property alleged to belong to said plaintiff in that suit, this plaintiff as the cross-complainant in that suit alleged that said plaintiff owned the lands situated and lying in York county, Nebraska, known and described as follows:

"The east half of the southeast quarter of section seven (7), the southwest quarter and the south half of the northwest quarter of section eight (8) all in township ten (10) north, in range two (2) west, in York county, Nebraska. The cross-complainant further alleged that plaintiff in that suit owned property situated in said Ben-

ton county of considerable value, consisting of a dwelling house and lot on which the parties resided, and personal property consisting of money, notes, mortgages, furniture, etc.

"Said cause was tried in said court of chancery on the first day of March, 1911, and after a full hearing thereof, said court of chancery found the issues in that suit against the plaintiff therein and in favor of the defendant therein who was cross-complainant, and who is plaintiff herein, and entered a decree granting this plaintiff, who was defendant therein, an absolute divorce from the complainant therein, and restoring this plaintiff to her maiden name of Lucie Bodie; a copy of which decree is hereto attached, marked 'Exhibit A' and made a part hereof. Said court of chancery further found that the complainant in that suit was justly indebted to the defendant therein for borrowed money amounting to \$2,500.00; that the value of said house and lot was \$2,500.00 and that complainant's personal property was of the value of about \$7,000.00 and that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the State of Arkansas, and that in consequence of that fact in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into the account the above mentioned property situated in York county, Nebraska. Said court was limited by the laws of Arkansas from taking into consideration said property lying in York county, Nebraska, in determining the amount of alimony that should be granted to defendant in that suit, who is plaintiff herein.

"The laws of the State of Arkansas then in force, among other things, provide as one of the grounds authorizing the courts of chancery to grant a divorce as follows:

"Where either party has been addicted to habitual drunkenness for a space of one year or shall be guilty of such cruel or barbarous treatment as to endanger the life of the other, or shall offer such indignities to the person of the other as shall render his or her condition intolerable."

"The laws of the State of Arkansas further provide:

"Where the divorce is granted to the wife each party is restored to all property not disposed of at

the commencement of the action, which either party obtains from or through the other during the marriage and in consideration, or by reason thereof, and the wife so granted a divorce from the husband, shall be entitled to one-third of the husband's personal property absolutely, and one-third of all lands of which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form.'

"Circuit courts have general equity jurisdiction as at common law, except in the County of Pulaski, and where separate chancery courts have been established by law.'

"Plaintiff further alleges that in the circuit of which Benton county, Arkansas, is a part, a regular chancery court has been established by law.

"Plaintiff further alleges that the above and foregoing provision of the laws of Arkansas is the only provision providing for allowing of alimony to the wife in case of divorce in her favor.

"Plaintiff further alleges that when said cause so commenced in the chancery court of Benton county, Arkansas, was tried during the first days of March, 1911, and when the same was determined, and as a part of said finding and decree entered therein, it was ordered and decreed that defendant in that cause should recover from the plaintiff therein the said sum of \$2,500.00 of money borrowed as above mentioned as found, and that she should be and was decreed as alimony one-third in value of said plaintiff's personal property, and the present value of her life interest in one-third of the value of said house and lot, and the court further found and decreed that the said sum of \$2,500.00 borrowed money, the one-third in value of said personal property, and the present value of defendant's life interest in one-third of the value of said house and lot all together aggregated the sum of \$5111.00, which sum was allotted and decreed to her, together with certain articles of furniture, which originally belonged to her.

"This was the only allotment made to or for defendant in that suit, who is the plaintiff herein, and said court of chancery was limited and prohibited from taking into account in determining said amount of allowance to said

defendant, the said lands lying and being in York county, Nebraska, or their value and the only amount of alimony allowed said defendant was the sum of \$2,611.00, being the balance of said sum of \$5,111.00 left after deducting the \$2,500.00 of borrowed money due defendant from said complainant, as above alleged.

"This plaintiff alleges that said lands situated in York county were owned by this defendant, who was complainant in the above mentioned suit, at the time that said suit was commenced and at the time said decree of divorce was entered, and the said lands were well and reasonably worth \$150.00 per acre, and in the aggregate were worth at least \$48,000.00. And the amount of alimony so allotted and allowed to this plaintiff in the suit is largely inadequate and insufficient for the support of this plaintiff, and is not such fair proportion of the property of this defendant, owned by him at the date of said decree of divorce, as this plaintiff then was and still is entitled to in view of all the circumstances surrounding this case and the services and hardships endured and performed by this plaintiff for this defendant.

"Wherefore this plaintiff prays that this court will take cognizance of this whole matter; that on a full and final hearing herein this court will grant, allow and adjudge and decree to this plaintiff a reasonable sum out of the value of the defendant's property located in York county, Nebraska, and above described, as and for alimony to which she is entitled, in addition to the said amount so allowed in and by the said court of chancery of Benton county, Arkansas; and that this defendant be restrained and enjoined from transferring or otherwise disposing of said lands until said amount of additional alimony is fully paid; and that this court will grant unto this plaintiff such other and further order or decree as she may be entitled to in law or equity, and that she may recover such fair and reasonable sum from defendant as attorney's fees for her attorneys for their services, as the court may find to be reasonable, to be taxed as costs and that defendant be required to pay the costs herein and that execution may issue therefor."

EXHIBIT A.

"IN THE BENTON COUNTY CHANCERY COURT.

EDWARD BATES, *Plaintiff,*

vs.

LUCIE BATES, *Defendant.*

"On this day this cause came on to be heard upon the complaint of the plaintiff, the answer and cross-bill of the defendant and the plaintiff's answer to said cross-bill and documentary and oral proof adduced, and said depositions taken in said cause.

"And the court after hearing same and being well advised in the premises both dismiss plaintiff's bill for want of equity and doth grant a divorce on the cross-bill of the defendant herein.

"It is ordered, adjudged and decreed by the court that the defendant Lucie Bates have and recover of and from the defendant Edward Bates the sum of \$5,111.00 in full of alimony and all other demands set forth in the cross-bill, which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment decree herein rendered.

"It is further ordered, adjudged and decreed by the court that the defendant, Lucie Bates, have the following personal property now in the residence of Edward Bates at Siloam Springs, Arkansas; that is to say, such silverware as has been purchased since the marriage of plaintiff and defendant. One sideboard and china cabinet; one chiffonier, one mattress, one-half of the quilts and comforts, one leather rocker, one wicker rocker, two birds-eye maple chairs, one water tankard and such china as is her separate property.

"It is further ordered and decreed by the court that a lien be declared on the following real estate in Benton county, Arkansas, owned by plaintiff to secure payment of said judgment; Lot No. 9, Block No. 8, Beauchamp's addition to the City of Siloam Springs, Benton county, Arkansas; and that the defendant place with the clerk of this court four notes of \$280.00 each or a total of \$1,120.00. One note for \$89.60. One note for \$112.00, the same having been given by one Shockey

to Edward Bates. One note for \$500.00 and two notes for \$40.00, given by Ida and W. S. Tibbs to Edward Bates. One note for \$400.00 given by Richard O. Forman to Edward Bates; one note for \$500.00 given by Norris and Yonkers, being a total of \$2,801.06, which are by the said Edward Bates, in open court deposited with the said clerk, all of which notes are secured by mortgages.

"It is understood and agreed that the said Edward Bates may sell and dispose of any and all of said property, including real estate and notes, but upon the sale of same he is to deposit the proceeds arising from said sales with the clerk of this court until he has paid the sum of \$5,111.00 together with 6 per cent interest on the same up to the time of such payment.

"It is further ordered and adjudged by the court that no execution issue on this judgment for six months from this date and that such judgment bear interest at the rate of 6 per cent per annum from date until paid.

"It is further ordered by the court that both plaintiff and defendant may withdraw all exhibits filed in said cause, and the plaintiff may withdraw the testimony given by him and taken in shorthand by W. F. Cnine, notary public.

"The court finds from the evidence that the defendant's maiden name was Lucie Bodie and it is ordered and adjudged by the court that she is restored to her maiden name.

"It is further ordered and adjudged by the court that plaintiff pay all costs in this suit laid out and expended.

"It is further ordered and adjudged by the court that the bonds of matrimony entered into by and between plaintiff and defendant be dissolved, set aside and held for naught."

To the above petition a general demurrer was filed by the defendant, the plaintiff in error, which was sustained by the district court as shown by the order found on page 8 of the printed record. Thereupon this defendant in error,

the plaintiff below, appealed to the supreme court of Nebraska, where, after a full argument the judgment of the district court was reversed, the petition held to state a good cause of action, and the cause remanded to the district court for further proceedings, in accordance with law. The syllabus and opinion of the court by Fawcett, J., is found commencing on page 9 of the printed record; and is also found in 95 Nebraska 757.

Thereafter and on the 15th day of August, 1914, the defendant, the plaintiff in error here, filed his answer, which is found commencing on page 18 of the printed record and omitting the title and signatures is as follows:

"Comes now the defendant Edward Bates and for answer to the plaintiff's amended petition herein filed, admits that the plaintiff and defendant were married on or about the 1st day of January, 1889; admits that the plaintiff obtained a decree of divorce from this defendant by the consideration of the chancery court of Benton county, Arkansas, in 1911, a copy of which decree is attached to plaintiff's petition; admits that the defendant at the time of said divorce proceedings owned a house and lot in Benton county, Arkansas, of the value of about \$2,500.00 and that he owned personal property of the value of about \$4,000.00 as alleged in the plaintiff's petition; admits that this defendant then held the legal title to 320 acres of land in York county, Nebraska, described in the plaintiff's petition; and denies each and every other allegation set forth and alleged in plaintiff's petition, except as may be herein-after expressly admitted or modified.

SECOND DEFENSE.

"The defendant alleges that he now is and at all times since the first day of January, 1910, has been a resident and citizen of the State of Arkansas. And at no time within the period above named was the defendant a resident or citizen of the State of Nebraska, nor was he domiciled at any time during said period in York county, Nebraska.

"The defendant further alleges that at all times between the 1st day of January, 1911, and the 2nd day

of March, 1911, the plaintiff in this action was a resident and citizen of Arkansas and maintained a domicile in said state. Shortly after March 2nd, 1911, the plaintiff located her residence and domicile in Johnson county, State of Nebraska, and resided in said county at the time of the commencement of this suit. Neither at the time of the commencement of this suit nor at any time subsequent thereto was the plaintiff a resident of York county, Nebraska. At the time of the commencement of this suit the plaintiff had been a resident of Nebraska for a period of less than six months.

"By reason of the facts above alleged, the district court of York county, Nebraska, was, and is without jurisdiction to hear and determine the question of plaintiff's right to additional alimony either under the statute governing the subject of divorce and alimony or the general jurisdiction of the court.

THIRD DEFENSE.

"This defendant shows to the court that the county of Benton is one of the duly organized counties of the State of Arkansas; that under the laws of the State of Arkansas a chancery court having general equity jurisdiction as well as jurisdiction of the subject of divorce and alimony, convenes and sits at certain period during the year in Benton county, Arkansas, and is known as the chancery court of Benton county, Arkansas.

"On and prior to the 1st day of January, 1909, the plaintiff and defendant were each residents and citizens of Benton county, Arkansas. Prior to the month of June, 1910, they resided together as husband and wife. On or about the 14th day of June, 1910, this defendant as plaintiff filed his petition in the chancery court of Benton county, Arkansas, versus the plaintiff in this suit in which the defendant sought to recover a divorce from the plaintiff in this suit; a copy of which petition is hereto attached and herewith filed and made a part of this answer, to the same extent and in the same manner as if fully set forth herein, and marked "Exhibit A."

"On or about the 29th of June, 1910, the plaintiff in this suit defendant in the divorce proceedings instituted by this defendant in the chancery court of Benton county, Arkansas, filed her answer to the petition that has

been filed by this defendant; and by way of cross-petition alleged facts, which if found to be true, would have entitled her to a divorce from the defendant under the laws of the State of Arkansas. Among other things, she alleged in her cross-petition as a basis for the recovery of alimony that this defendant owned real and personal property of the reasonable and fair value of \$75,000.00, part of which consisted of 320 acres of land situated in York county, Nebraska, being the land described in plaintiff's petition, together with other property situated in Oklahoma and Arkansas; a copy of which answer and cross-petition is hereto attached and herewith filed and made a part of this answer and marked Exhibit 'B.'

"On or about the 14th day of July, 1910, this defendant filed an answer in the chancery court of Benton county, Arkansas, to the cross-petition that had been filed by the plaintiff, defendant in that action. In his answer this defendant admitted that he owned certain property alleged in the cross-petition to be owned by him. He also admitted that the legal title to the property in York county, Nebraska, described in the cross-petition, stood in his name; but alleged that he held the legal title to one-half of said property in trust for the use and benefit of his two daughters and a son by a former marriage. A copy of said answer is hereto attached and herewith filed and made a part of this answer and marked exhibit 'E'.

"On or about the 2nd day of March, 1911, the issues formed by the respective parties hereinbefore set forth by this defendant as plaintiff, and by the plaintiff, as defendant in the divorce proceedings instituted and pending in the chancery court of Benton county, Arkansas, were tried by that court. In the trial of said issues evidence was offered and received by the court touching the value of the property owned by this defendant, including the value of the land that stood in the name of this defendant, and situated in York county, Nebraska. Upon full consideration by the chancery court of Arkansas of the evidence and the issues in said divorce proceedings, in which said court took into consideration the value of the land that stood in the name of this defendant in York county, Nebraska, in determining the amount of alimony that should be awarded to the defendant in that action; and on or about the 2nd day of March, 1911, entered its findings and

decree on the issues made and the evidence adduced by the respective parties, in which the defendant in that action, plaintiff in this action, was awarded a decree of divorce against this defendant and was awarded 'the sum of \$5,111.00 in full of alimony and all other demands set forth in the cross-bill' filed in said suit by the plaintiff in this suit. A copy of said decree is hereto attached, herewith filed, made a part of this answer and marked exhibit 'F'.

"On and between the 7th day of March, 1911, and the 11th day of April, 1911, this defendant fully paid the amount of alimony awarded to the plaintiff in this suit, including all costs of the chancery court of Benton county, Arkansas; which was duly received by the plaintiff and received for; that a copy of the docket entries showing said payment is hereto attached, herewith filed and made a part of this answer and marked exhibit 'G'.

"No appeal has been taken from the findings and decree of the chancery court of Benton county, Arkansas, as herein alleged and said decree remains in full force and effect, except that the amount of alimony awarded therein has been fully paid by this defendant and received by the plaintiff.

"This defendant alleges that the issues formed, heard and determined by the chancery court of Benton county, Arkansas, between the plaintiff and defendant in this suit, defendant and plaintiff in that suit, in which the chancery court of Benton county, Arkansas, in awarding to the plaintiff alimony, took into consideration all of the property owned by this defendant; which decree, so far as it relates to alimony, having been fully satisfied, has become a full and complete bar to further proceedings on the part of the plaintiff in this suit, defendant in that, to recover additional alimony under the laws of the State of Arkansas.

"Under the constitution of the United States the findings and decree of the chancery court of Benton county, Arkansas, as herein alleged and set forth, are entitled to full faith and credit in the courts of the State of Nebraska; and when full faith and credit is given the findings and decree of the chancery court of Benton county, Arkansas, in this court, said findings and decree constitute a full and complete bar to the plaintiff's al-

leged right to recover additional alimony under the laws of the State of Nebraska.

"Further answering, this defendant shows to the court that at the time of the marriage of the plaintiff and defendant in the year 1889 the plaintiff was possessed of no property in her own right other than wearing apparel; and that no time during said marriage did plaintiff acquire property from any person other than this defendant; and this defendant specifically denies that he was indebted to the plaintiff for borrowed money at the time of the divorce proceedings in Benton county, Arkansas, as set forth in plaintiff's amended petition herein and denies that the chancery court of said Benton county, Arkansas, found that he was so indebted to plaintiff, as set forth in plaintiff's petition herein.

"And this defendant further alleges that the laws of the Arkansas court in force at the time of said divorce proceedings provided (Sec. 2684, Arkansas Statutes): 'An order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof.'

"Wherefore, this defendant prays first, that it may be found and determined that the district court of York county, Nebraska, has no jurisdiction to entertain the application of the plaintiff for additional alimony; second, that under the full faith and credit clause of the Constitution of the United States, the findings and decree of the chancery court of Benton county, Arkansas, may be held to be a complete bar to the plaintiff's action in this case; third, that this defendant may be dismissed and recover his costs."

The reply to this answer is found commencing on page 34 of the printed record and omitting the title and signatures is as follows:

"And now comes said plaintiff, and for reply to the answer herein filed, admits that these parties were married in said County of York in January, 1889, and while both this plaintiff and defendant were living in and were residents of Siloam Springs, in Benton county, Arkansas, this defendant as plaintiff or complainant filed his bill commencing a suit for divorce from this

plaintiff as respondent, in June, 1910, that afterwards, and on June 29th, 1910, this plaintiff as respondent in that suit filed her answer and cross-bill, denying the allegations set out in said complaint as grounds of divorce and alleging acts of drunkenness, cruelty and unmanly and indignant conduct on the part of said complainant in that suit, as grounds for a divorce for which she prayed, and for reasonable allowance as and for alimony and means of support; that afterwards and on July 14th, said complainant, defendant herein, filed his amended bill of complaint against said respondent, this plaintiff, alleging various acts of misconduct on the part of this plaintiff, as respondent in that suit, as for grounds for a divorce to him from her; that afterwards and on the 14th day of July, 1910, this plaintiff as respondent in that suit filed her answer to said amended bill of complaint; and thereafter but on the same day, July 4, 1910, said complainant in that suit, this defendant, filed his answer to said cross-bill of this plaintiff, filed as respondent in that suit, and thereafter, on the 2nd day of March, 1911, said suit was tried in the court of chancery of Benton county, Arkansas, in which said suit for divorce was commenced and pending and decree entered therein in favor of this plaintiff, as respondent therein, a copy of said decree is attached to and filed with plaintiff's petition herein, and this plaintiff denies each and every other allegation contained in defendant's answer herein.

"This plaintiff specifically denies that said court of chancery of Benton county, Arkansas, either had jurisdiction to take the land belonging to defendant Edward Bates, lying and being in York county, Nebraska, into consideration in determining the amount to be allowed respondent in that suit, this plaintiff, or the value of said lands; and plaintiff further denies that said court of chancery did take into consideration in determining the amount of said allowance, said lands or their value, but on the contrary said court of chancery refused and declined to take said lands or their value into consideration in determining the amount of said allowance to said respondent in that suit, this plaintiff and said court of chancery held that it had no power or jurisdiction to consider said lands or their value in making said allowance, but held and adjudged that said court was limited by the statutes of Arkansas to the consideration of the property of complainant in that suit,

situated within the limits of the State of Arkansas, and that the statutes of Arkansas provided that the only allowance that could be made by said court of chancery was fixed by said statutes as stated in the amended petition herein.

"This plaintiff further replying, alleges that in her cross-bill filed in said suit in the chancery court of Arkansas, she alleged that about the year 1902 she became the owner in her own right of \$3,000.00 in money and shortly thereafter she loaned \$2,500.00 of the same to her then husband, this defendant, taking his notes for the same bearing interest at the rate of 8 per cent per annum and in her said cross-bill among other things, she prayed that he, said husband, be required to restore to her said \$2,500.00 so borrowed of her together with interest thereon at the rate of eight per cent per annum; and her said husband, this defendant, in his answer to said cross-bill, he among other things, alleged that upon their first separation he gave his wife, this plaintiff, \$3,000.00, and when they patched up their differences and again resumed the relation of husband and wife, she returned \$2,500.00 of that sum to him and that his said wife never gave him and he never came into possession of any other money or property acquired by his wife from any other source than himself.

"Upon the issue thus presented to said court of chancery a hearing was had and it was by said court regularly and finally adjudicated in favor of this plaintiff, as respondent and cross-complainant in said suit, and it was then and there adjudicated that said complainant in that suit, this defendant, was justly indebted to this plaintiff, who was cross-complainant in that suit in the said sum of \$2,500.00, and that he be and was required to pay her said sum as a part of the allowance of \$5,111.00 adjudicated in favor of this plaintiff, as cross-complainant in that suit; and this defendant is now barred by said adjudication from raising any question as to how or from whom this plaintiff came to own said \$2,500.00 in her own right.

"Wherefore this plaintiff prays that the prayer of the defendant be denied."

A trial was had in the district court of York county, Nebraska, and after the introduction of the evidence and

argument of counsel, the cause was taken under advisement of the court until the 13th day of January, 1915, when a finding and decree was entered in favor of the plaintiff below adjudging as due to her, and that she should recover the sum of \$10,000.00 additional alimony. Said judgment is found commencing on page 37 of the printed record and omitting the title is in the words and figures as follows:

"And now on this 13th day of January, 1915, this cause having been tried and submitted to the court on a former day of this term of court, and taken under advisement by the court, and the court being now fully advised in the premises, finds for the plaintiff and against the defendant and against the intervenors; and specifically finds that the intervenors, Alberta Bates, Clement E. Bates and Josephine Bates, have no interest in this suit and their petition of intervention does not contain or allege facts sufficient to entitle them to intervene herein, and that their petition should be dismissed; the court further finds that the court of chancery of Benton county, Arkansas, did not have jurisdiction or authority to take into consideration, in the divorce proceedings mentioned in the pleadings, the lands mentioned in the petition herein lying and being in York county, Nebraska, or their value, in fixing the amount of allowance allotted to the respondent in said divorce proceedings in said court of chancery, and that said court of chancery did not take into consideration said lands or their value nor their rental value in fixing said allowance; the court further finds that the value of said lands mentioned in the petition belonging to this defendant, which are located in said York county, Nebraska, was at the time said divorce proceedings for divorce suit was determined in said court of chancery, and it is at this time, forty thousand (\$40,000.00) dollars; and the court further finds that this plaintiff is entitled to additional alimony in the sum of ten thousand (\$10,000.00) dollars; but that the marriage relation between plaintiff and defendant having been dissolved and the obligation of defendant to support plaintiff having ceased before the commencement of this action, plaintiff is not entitled to any allowance for attorney's fees. Defendant and said intervenors except to each

of said findings, and plaintiff excepts to the finding of the amount of alimony to be allowed as being too small, and much less than should be allotted to her in view of the evidence herein, and also as to the finding that she is not entitled to any allowance as and for attorney's fees.

"It is therefore considered, adjudged and decreed that said intervenors take nothing by their petition of intervention, and that their said petition be, and the same is hereby dismissed, and said intervenors except.

"And it is further considered, adjudged and decreed that plaintiff have and recover of and from said defendant the said sum of ten thousand (\$10,000.00) dollars, being the amount found due her as alimony, together with the costs herein incurred taxed at \$..... and that execution issue therefor; but it is further adjudged and decreed that plaintiff recover nothing as attorney's fees; to the above finding and decree defendant and each of the intervenors except, and plaintiff excepts to the amount of said allowance as alimony as being too small and less than she should have been allowed under the evidence in this case, and she prays and is allowed an appeal thereon and also upon the denial of any allowance for attorney's fees, and plaintiff is allowed forty days from the rising of the court to prepare and serve her bill of exceptions; and defendant and each of said intervenors are allowed forty days from the rising of the court to prepare and serve their respective bills of exception.

E. E. GOOD, *Judge.*"

Defendant below, the plaintiff in error here, thereupon appealed said cause to the supreme court of Nebraska, where, after a full hearing, said judgment was in all things affirmed. The syllabus and opinions of the court are found commencing at page 40 of the printed record and are in the words and figures following:

BODIE

v.

BATES.

"Opinion Filed January 15, 1916.

"1. In the State of Arkansas, divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction. In such cases the courts of that state have no other powers than those expressly conferred by the statute. *Bowman v. Worthington*, 24 Ark., 522.

2. Sections 2681, 2684, Kirby's Digest of the Statutes of Arkansas, set out in the opinion, examined and held, that section 268 applies to cases where a husband obtains a decree of divorce against his wife and section 2684 to cases where the decree is granted to the wife against her husband.

"3. Section 2684, Kirby's Digest of the Statutes of Arkansas, examined and held to expressly determine just what interest a wife shall take in both real and personal property of her husband where she is granted a divorce, and under that statute the Arkansas court could not have vested in plaintiff in this suit, who was defendant there an interest for life, or other interest in the land of which her husband was then seized located in Nebraska.

"4. The pleadings and decree of the court of chancery in Arkansas examined and held, to have allowed plaintiff, as alimony, the sum of \$2,611.00 and no more; and that such sum was the amount which she was entitled to receive out of the estate of defendant, located in the State of Arkansas.

"5. It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment, it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suits. *Russell v. Place*, 94 U. S. 606.

"6. The general principles governing the pleading and proof of former judgments as estoppels are not quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to ap-

pear not only that there was a substantial identity of issues, but the issue as to which the estoppel is pleaded was in the former action actually determined.' *Slater v. Skirving*, 51 Neb., 108.

"7. The evidence in the record, taken in connection with the pleadings and decree in the chancery court of Arkansas, and the value of the real estate owned by defendant in the State of Nebraska, held, to conclusively show that the court of chancery in Arkansas did not take the Nebraska land into account in fixing the amount of alimony allowed plaintiff.

"8. A party cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention and afterwards in another litigation with the same party insist that the court did have jurisdiction of that particular property and should have adjudicated in the former action contrary to his contention there made, and so defeat an adjudication thereof entirely.

"9. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony allowed plaintiff, and having for that reason refused so to do, its judgment was right and an appeal therefrom would have been unavailing.

"10. The contention that the decree in this case does not give full faith and credit to the judgment of a sister state is without merit.

"11. The opinion on the former hearing in this case, 95 Neb. 757, in so far as it is applicable to the facts now appearing in the record is adhered to as the law of the case.

"Fawcett, J.:

"On the first trial of this cause in the district court for York county, a general demurrer to the petition was sustained and plaintiff appealed to this court. We found that the petition stated a cause of action, and the judgment was reversed and the cause remanded for trial, 95 Nebraska, 757. The trial in the district court after the case was remanded resulted in a decree in favor of plaintiff for \$10,000 alimony. Defendant appeals.

"Our former opinion contains quite a full recital of the troubles of plaintiff and defendant while husband

and wife, and a sufficient statement of the issues involved in this suit. The parties were divorced March 2, 1911, in the court of chancery in Benton county, Arkansas, and plaintiff by the decree in that case was restored to her maiden name of Bodie, which accounts for the difference in the names of the parties in the present suit. As reference will frequently be made in this opinion to the parties as they appear in the Arkansas suit and as they appear in the present suit, we will, for the purpose of avoiding any confusion as to the parties, refer to the plaintiff in this suit, who was the defendant in the Arkansas court as 'Bodie' and to her former husband, defendant in this suit, as 'Bates.' In the Arkansas court Bates instituted the suit for divorce, alleging infidelity and other misconduct. Bodie denied the allegations of the petition and prayed for a decree of divorce in her favor. She alleged the property of Bates in Arkansas and also alleged that he was the owner of real estate in Nebraska of the value of \$48,000.00 and prayed judgment and alimony. Bates and his counsel there contended on the trial of that suit that under the law of Arkansas the court in fixing the amount of alimony could not take into consideration the Nebraska land and allow the wife alimony on account of the value of such land. 'In divorce cases the court of equity must look to and be governed by the statute, and cannot exercise inherent chancery powers not provided by the statute.'

"*Ex Parte Helmert*, 103 Ark. 571. 'Where by statute jurisdiction over particular subjects of equity is conferred, or given to common law courts the entire body of law administered in the equity courts of this country attaches; but the subject of divorce and all incidental questions including alimony and matrimonial causes are not subjects of equitable jurisdiction; and in such cases the courts have no other powers than those expressly conferred by the statute.' *Bowman v. Worthington*, 24 Ark. 522. See also *Thomas v. Thomas*, 27 Okla. 784. In our former opinion we determined that (p. 762) 'An examination of the Arkansas statute above set out shows that in that state no provision is made authorizing a money judgment as alimony. The law expressly declares just what interest the wife shall take in both the real and personal property of her husband where she is granted a divorce. As to real estate, the provision is that she shall be entitled to 'one-third of all lands of

which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form. It will not, of course, be contended by any one that under that statute the Arkansas court could have vested in Mrs. Bates, for life, one-third of the lands of which her husband was then seized located in Nebraska. That provision unquestionably refers to lands situated within the jurisdiction of the court. We also have decided that (p. 763) 'It is clear, therefore, that as to the Nebraska land the rights of the parties were not adjudicated in that action.' There is some contention now that our former decision as to the effect of the Arkansas statute and as to the fact that the Arkansas court did not allow alimony on account of the York county land should not be considered as the law of the case because of the evidence which was introduced upon the trial from which this appeal is taken. The Arkansas statute referred to in the opinion, so far as it is pleaded and proved in the case, reads as follows: 'And where the divorce is granted to the wife the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form.' Kirby's Digest, section 2684. The record now shows that there is a prior section of the statute of Arkansas which provided: 'When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable.' Kirby's Digest, section 2681. Can these two sections of the statute be construed together, or must they be distinguished and construed to apply to different conditions or situations? That they cannot be construed together is apparent upon their face, for they are directly contradictory. The statute first above quoted, which prescribes specifically what shall be allowed the wife as alimony when she is 'so granted a divorce against the husband' is a later statute than section 2681, above

quoted. Sec. 83, p. 836, 1 R. C. L., shows very clearly why section 2681 was enacted by the Arkansas legislature viz.: 'According to the rule of the common law where a divorce was granted for the misconduct of the wife, she was not entitled to alimony. This was productive of so much hardship, however, and so frequently left her a prey to starvation or a life of shame, especially where her own property had become vested in her husband by reason of the marriage, that statutes have been enacted in England and a number of the United States authorizing the courts to make such an allowance of alimony in favor of a guilty wife as the surrounding circumstances may justify.' Two of the states cited in this text are Arkansas and Oklahoma. In *Ecker v. Ecker*, 22 Okla., 873, we have a discussion of this identical section, viz.: 'The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the State of Arkansas, from which state the statutes in force in the Indian Territory were adopted, the common law has been modified by statute. The statute governing in this case reads: (The section of the statute quoted in the opinion is a *verbatim* copy of 2681 Kirby's Digest, under consideration in this case.) Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. (Citing cases.) It is, however, a discretion that a court should at all times exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances. In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce.' The trial court ordered

an equal division of the property or that defendant have judgment for one-half of the value of the same. This judgment was held erroneous, the holding being based on section 2568, enough of which is set out to show that that section is a duplicate of section 2684 in this case. In *Pryor v. Pryor*, 88 Ark., 302, it is said 'The first question presented is whether or not the chancery court had jurisdiction to decree an allowance of alimony to a guilty wife against whom a decree for divorce was granted.' The court then quoted from 2 Nelson, *Divorce and Separation*, Sec. 107, where the question of the allowance of alimony to a wife, when the husband has obtained a divorce, is discussed along the same lines as the discussion in 1 R. C. L. above cited. The court then says: 'A statute of this state provides that.' The court here quotes section 2681, Kirby's Digest, and then adds: 'Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife.' The above authorities clearly show just what the legislature intended when it enacted section 2681, viz.: That this section was enacted in order to permit the chancery courts of the state to award alimony to the wife in cases where the divorce was obtained at the suit of the husband on account of her misconduct. In such cases the legislature very properly left it to the court to make 'such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable.' But when, later on in the act, the legislature considers the question as to what a wife shall be entitled to receive when a divorce is granted to her against her husband for his wrong doing, they enacted section 2684 above quoted. Otherwise, why do they use the language: 'where the divorce is granted to the wife,' and the further expression, 'and the wife so granted a divorce against the husband shall be entitled,' etc. It is clear that the purpose of the legislature was that the amount which the wife should receive in such a case should not be enshrouded in any uncertainty by leaving it to the discretion of the court to say what should be a reasonable allowance to her, but fixed the amount, definitely, as to both the real and personal estate. There is nothing ambiguous in this section of the statute. Its terms are too plain to be misunderstood. It is clear, therefore, that the allegation in the petition in this suit that section 2684, Kirby's Digest,

was the only statute in force in Arkansas, at the time of the trial of the suit there, which provided for the allowance of alimony in a case where a divorce was granted to the wife against the husband, is a correct statement of the law. Section 2681 has no application whatever to such a case. In this manner and in no other can effect be given to each of the two statutes under consideration. It will be seen that the allowance of alimony to the wife, when a divorce is granted for her fault, rests upon an entirely different basis than when the divorce is granted to her favor, and it is common in the United States, as above shown, to make that distinction by statute. There can be no doubt, therefore, that the general rule that a specific statute, applies here, and that the statute quoted in our former opinion, being section 2684, controls the courts of Arkansas in all cases where a divorce is granted in favor of the wife. In such case the court is required to divide the personal property to give her one-third thereof 'absolutely,' and to give her a life estate of one-third of the husband's lands. The Arkansas court could not secure to the wife the use of real estate outside of the jurisdiction of the court. In *Wood v. Wood*, 59 Ark. 441, 452, it is said: 'Appellant did not undertake to show, in her original or amended bill for divorce, that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than \$200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state. Nothing appears in the record, outside of the evidence, to show that the court committed an error of law in failing to divide the estate of the husband in accordance with the act.' We are unable to read that language of the court and reach any other conclusion than that the law of Arkansas limits the jurisdiction of a court of chancery in fixing alimony in a divorce case to property within the jurisdiction of the court. There was then just ground for the contention in the Arkansas court that that court had no jurisdiction to allow the wife alimony on account of the real estate of the husband in Nebraska. Was such a contention made? It is conceded, and the record before us clearly shows,

that defendant did, with the help of able counsel, strenuously contend in the Arkansas court that that court could not in that case allow alimony to Bodie on account of the Nebraska lands. And the record also shows that the court did not in fact make any allowance on account of the Nebraska lands. It is shown by the overwhelming weight of the evidence before us that the Arkansas court allowed Bodie \$5,111.00 'in full of alimony and all other demands set forth in the cross bill.' The only demand set forth in the cross bill, outside of alimony, was the restoration to her of \$2,500 which she had loaned to Bates when they were living together as husband and wife. Deduct this sum from \$5,111.00 and it will be seen that the total amount allowed for alimony was \$2,611.00. Under the admissions of Bates and the uncontradicted evidence, he, at the time of the divorce trial owned personal property and notes and mortgages within the jurisdiction of the Arkansas court, amounting in the aggregate to \$7,000.00 and a house and lot, also within the jurisdiction of the court, worth \$2,500.00. Under the statute Bodie was entitled 'absolutely' to one-third of the \$7,000 of personal property, or \$2,333.33. She was also entitled to the present value of a one-third interest for life in the house and lot. If we figure that life interest at only \$278.00, it would make her statutory interest in the property of Bates, situated in Arkansas \$2,611.00, being the sum allowed as alimony by that court. Hence, it is idle to say that the chancellor considered the Nebraska land in fixing the amount of alimony. If he 'considered' it he considered it only to the extent of determining that he had no jurisdiction to take it into account in fixing the amount of alimony. It would be a travesty not only upon the law but upon the commonest principles of justice for us to hold that the chancellor, when he decided the divorce case and allowed Bodie \$2,611.00 of alimony, took into consideration personal property of the value of \$7,000.00 and real estate to the value of \$2,500.00, located within the jurisdiction of his court, and also took into consideration the value of real estate in this state which the decree before us finds was worth \$40,000.00 at the time the chancellor in Arkansas tried that case. If, in addition to the property within his jurisdiction, he had also taken into account the present value of an estate for life in one-third of land in Nebraska, worth \$40,000.00, the amount which he would have been compelled to allow would have far exceeded the value of all the property which Bates owned in Arkansas at that time. If he took into consideration the land in Nebraska he was bound to

consider it in the light of the law of Arkansas which would require him to allow her a life estate of one-third interest in the Nebraska land. He allowed her, all told \$2,611.00. Further comment is unnecessary. *Res Ipsa Loquitur*. From what has just been said, it will be seen that that court was without jurisdiction; and prevented any allowance on account of the Nebraska land. He now, in this case, says that his contentions there were unwarranted; that the court did have jurisdiction; and by these inconsistent positions he insists that he has defeated the just claims of his wife. This of course he cannot be allowed to do.

"In *Cross v. Lery*, 57 Miss. 634, it was held that a party who had agreed that a justice of the peace had jurisdiction of a case could not afterwards, as against the same party, contend that the justice did not have such jurisdiction. In *Long v. Lockman*, 135 Fed. 197, it was held that a party, who, in a suit in the district court of the Arkansas district, had alleged that the district court of the Colorado district had exclusive jurisdiction of the case and upon that contention had procured the case to be dismissed by the court of the Arkansas district, could not afterwards be heard to contend against the same party that the court of the Colorado district was without jurisdiction when sued in that district. The court said: 'In my opinion, Williams in his lifetime was, and the administrator now is, estopped from denying that his residence was in Colorado when the petition herein was filed. * * * Every element of estoppel is in the evidence, and the evidence on that question is not in conflict. Williams, under oath said his residence was in Colorado. He received the advantage from that oath. The petitioning creditors acted on it. They filed their petition here. They have incurred much expense by reason of that oath. It cannot now be controverted. * * * I pass those questions by, and hold that this court has jurisdiction upon the grounds of estoppel. And that filing pleadings, offering evidence, making objections, obtaining rulings, and so forth, in one case, may be an estoppel in another case, see the following.' (Citing many cases.) A party is estopped to deny facts pleaded to defeat jurisdiction of court. *Caldwell v. Morris*, 120 La. 879, 15 L. R. A. (N. S.) 423, and cases cited in note. He cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same parties insist that the court did

have jurisdiction of that particular property and should have adjudicated it in the former action and so defeat any adjudication thereof entirely.

"Is the judgment in the Arkansas court *res judicata*? *Thomas v. Thomas*, 27 Okla. 784, construing an exactly similar statute, cites *Bowman v. Worthington*, *supra*, and quotes with approval the holding in that case above set out; and adds: 'The trial court not possessing jurisdiction to entertain the question of the disposition of this property in the divorce proceeding, the same did not become *res adjudicata* by reason of that action, hence is left open for determination in this case.'

"*Matson v. Poncin*, 152 Ia. 569, 132 N. W. 970, holds: 'A judgment to be available as an estoppel must have decided the particular matter involved in the later suit; it is not sufficient that the same question may have been determined.'

"In 1 *Herman, Estoppel and Res Judicata*, Sec. 252, it is said: 'The rule that estoppels must be certain to every intent and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available either as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters which were not determined. An estoppel by judgment is never inferred unless the basis on which it rests is such as to lead to the conclusion that the whole subject was litigated and adjudicated.' See also, *Res Adjudicata*, Sec. 223.

"In *Packet Co. v. Sickles*, 72 U. S. 580, 592, it is said: 'As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleadings as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as

having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.'

"In *Russell v. Place*, 94 U. S. 606, the court, speaking through Mr. Justice Field, said: 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.'

"In *Mercer Co. v. City of Omaha*, 76 Neb. 289, the first paragraph of the syllabus holds: 'The rule is well settled, both in this state and elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it is rendered.'

"Finally we cite *Slater v. Skirving*, 51 Neb. 108. The opinion in this case was by Mr. Commissioner Irvine. It shows a very careful consideration by that talented commissioner of a plea of *res judicata*. Beginning on the fourth line from the bottom of page 112, it is said: 'The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in

one action shall operate as an estoppel in a second action, it must be made to appear not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined; and where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit (citing case), and we think that while the authorities are conflicting, their greater weight is in favor of the view that the burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence if necessary, and not upon the other party to show that an issue which might have been adjudicated was not.

"*Slater v. Skirving* cast the burden in this case upon the defendant to sustain his plea by establishing the fact of the actual determination in the former trial, of the issues involved here, and under the other authorities cited that proof must be clear to the extent of leaving no room for doubt.

Judge Humphreys, who presided at the trial of the case in Arkansas, was called as a witness in this case. He was interrogated as to whether he took into consideration any ownership or equity of Bates in the land in Nebraska. His answer was: 'I think I did; it was my intention to cover the whole case.' He stated that he was testifying from his best recollection, but a reading of his entire testimony will show that his recollection was not any too clear. Bates, himself, and Mr. Walker, his attorney at the Arkansas trial, both testified that the chancellor took the Nebraska land into consideration in determining the amount which should be allowed Bodie as alimony. This testimony is controverted by the testimony of Mr. Lindsey, Mr. Shannon, Judge McGill, and Judge Davidson, all of whom were present and participating in the trial as counsel for Bodie at the time the chancellor rendered his decision, and by Mr. Heaslet, clerk of the court of chancery in which the case was tried. These five witnesses all testified clearly and explicitly that the chancellor announced from the bench at the time he decided the case, that he did not have jurisdiction over the Nebraska land, and could not consider the same. The four lawyers representing Bodie are gentlemen of high standing in the profession of the law, and with the exception of Judge Davidson, have no present interest in the litigation. Mr. Heaslet was clerk of the court and his testimony stamps him as a candid and truthful gentleman. There is nothing to show that he is in any manner

interested in either of the parties to the suit, and it cannot be supposed that he would have any motive in giving testimony about a transaction in the court of which he was clerk, at variance with that given by his presiding judge. When you add to the testimony of these five witnesses the fact that the court could not have taken the Nebraska land into consideration in making his allowance, as hereinbefore shown, the district court before which the suit at bar was tried could not have done otherwise than to credit the testimony of the five witnesses, corroborated by the facts so clearly shown, and discredit the testimony of the three witnesses to the contrary. Under the evidence above set out and the authorities cited, it is clear that the record now before us sustains the allegations in the petition which our former judgment held stated a good cause of action, and fully sustains every point decided in our former opinion. There is therefore no reason why that opinion should be departed from or in any wise modified.

"It is urged that the failure of Bodie to prosecute an appeal from the decree of the Arkansas court is a bar to the present suit. For the reasons above stated this contention is without merit. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony, and having refused so to do, its judgment was right and an appeal would have been unavailing. There was nothing to appeal from. Nor is there any merit in the contention that the decree in this case does not give full faith and credit to the judgment of a sister state.

"On the trial of this case the learned trial court followed our former decision. He was fully justified under the evidence in doing so and we cannot, without violating every principle of law and justice, reverse his judgment. If he erred at all it was in not allowing Bodie more than \$10,000.00.

"The judgment of the district court dismissing the petition of intervention of the interveners is so clearly right that we shall not spend time discussing it.

"The motion of plaintiff for an allowance of attorney's fees is overruled. The judgment of the district court is in all respects affirmed."

Sedgwick, J., concurring:

"No one denies that there was at least serious doubt as to the jurisdiction of the Arkansas court to give the wife

anything on account of the Nebraska land. This statute expressly provided that when the wife obtained the divorce the court should give her one-third of the personal property and the use of one-third of the husband's real estate during her life. The court could not give her the use of real estate that was not within the jurisdiction of the court. That proposition was contested vigorously before the Arkansas court, the husband contending earnestly by his attorneys that the court could not give her anything on account of foreign land, and the court, as is demonstrated from the record, did not give her anything.

"It appears conclusively from the record that the Arkansas court allowed her the money which she had loaned to the defendant, and the one-third of his personal property there in Arkansas, and the value of her life interest in the real estate that he had there. These items added together made the exact amount that the court allowed her, so that the record speaks for itself that the Arkansas court did not as a matter of fact give her anything on account of the York county land.

"In *Cizek v. Cizek*, 76 Neb. 797, it was decided that 'under section 27, Ch. 25, Comp. St. 1905, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties.' In the opinion the court said: 'In the case at bar good and sufficient reasons are shown why the former decree for alimony should be modified. * * * Having demonstrated that the attempted adjudication of the court upon the question of alimony was nugatory and of no effect, he cannot now be heard to urge it as a final adjudication of the matter.' So in this case the defendant on this trial insisted that the court could not give plaintiff anything on account of the Nebraska lands. The court did not give her anything. 'He cannot now be heard to urge it as a final adjudication of the matter.' "

ARGUMENT OF DEFENDANT IN ERROR.

We have made this somewhat extended statement, with the view of aiding the court in the examination of the case. We largely rely upon what we think are sound, pertinent, and unanswerable arguments in the opinions of the supreme court of Nebraska, both in passing upon the demurrer to the peti-

tion of the plaintiff in this suit, and upon the merits of the controversy after the case had been tried upon the merits and had been brought to that court the second time.

I.

Does This Court Have Jurisdiction of This Case?

We contend that this great court does not have jurisdiction of this case, and we filed a motion to dismiss or affirm, and we now refer to our said motion and our brief and argument in its support. The findings of fact by the district court of York county, Nebraska, in which court this case was originally brought, and in which it was tried, are found in the printed record beginning at page 37; and in our brief in support of our motion to dismiss or affirm, at page 17; and also on page 16 of this brief.

These findings are:

1st. A general finding for the plaintiff and against the defendant. This general finding, as we understand, includes, as a part thereof, the finding that the allegation of the plaintiff, defendant in error here, that the court of chancery of Benton county, Arkansas, in the divorce suit, found there was due plaintiff from defendant the sum of \$2,500.00 borrowed money, and that sum was allowed her as a part of the total amount allowed her, \$5,111, was true.

2nd. That the court of chancery of Benton county, Arkansas, did not have jurisdiction or authority to take into consideration, in the divorce proceedings, the lands mentioned in the pleadings lying and being in York county, Nebraska, in fixing the amount of plaintiff's allowance.

3rd. Said court of chancery did not take said lands lying in York county, Nebraska, into consideration in determining the amount of plaintiff's allowance, in the divorce suit.

4th. The value of said lands lying in York county, Nebraska was, and is, \$40,000.00.

5th. That plaintiff is entitled to additional alimony in the sum of ten thousand dollars.

We understand that this court will not review the findings of fact determined in the courts below. Counsel for plaintiff in error seems to contend otherwise. But in any event, it does seem to us that each of said findings is amply supported by the proofs.

We contend that the 2nd and 3rd findings above stated, are absolutely conclusive of this case, and that both are amply sustained by the proofs in the record. There were two sections of the statutes of Arkansas introduced in the evidence. One, section 2681, enacted in 1837 (see page 71 of the printed record). And the other, section 2684, enacted in 1893 (see page 70 of printed record). This last section is specially pleaded in the petition and is alleged to be the only statute of Arkansas providing what portion of the husband's property shall be allotted to the wife, *in case the divorce be granted to her, and, against the husband.* This last statute is quoted in full on page 70 of the printed record. It speaks for itself. The provision of that statute upon which we rely is in these words:

"And when the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage *and* in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, for her life, unless the same shall have been relinquished by her in legal form."

Judge Fawcett, speaking for the supreme court of Nebraska, in his able opinion, deciding this case, as found on page 45 of the printed record, says:

"There is nothing ambiguous in this section of the statute. Its terms are too plain to be misunderstood.

It is clear therefore, that the allegation in the petition in this suit that section 2684 of Kirby's Digest, was the only statute in force in Arkansas, at the time of the trial of the suit there, which provided for the allowance of alimony in a case where a divorce was granted to the wife as against the husband, is a correct statement of the law. Section 2681 has no application whatever to such a case. In this manner and in no other can effect be given to each of the two statutes under consideration. It will be seen that the allowance of alimony to the wife, when a divorce is granted for her fault, rests upon an entirely different basis than when a divorce is granted in her favor, and it is common in the United States, as above shown, to make that distinction by statute. There can be no doubt therefore, *that the general rule that a specific statute upon a given subject will control as against a general statute that might include the same subject in the absence of a specific statute*, applies here, and that the statute quoted in our former opinion, being section 2684, controls the courts of Arkansas in all cases where a divorce is granted in favor of the wife. In such case the court is required to divide the personal property, and give her one-third thereof absolutely, and to give her a life estate of one-third of the husband's lands. The Arkansas court could not secure to the wife the use of real estate outside of the jurisdiction of the court. In *Wood v. Wood*, 59 Ark. 452, it is said: 'Appellant did not undertake to show in her original or amended bill for divorce that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than \$200,000.00, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state.' (The italics are ours, used to challenge attention to the language we deem most important).

It is plainly manifest from this language quoted by Judge Fawcett from the above mentioned decision of the supreme court of Arkansas, that in order for the wife to be granted the

particular share of her husband's property, at least that portion of it consisting of real estate, must have been within the state of Arkansas. The court will notice that the reason the allowance to the wife made in *Wood v. Wood, supra*, was not modified, was because that allowance was made by agreement of the parties.

But in a more recent case the supreme court of Arkansas has construed this same section, being section 2517 of Sandall & Mill's Digest, which is the same section as section 2684 of Kirby's Digest. In a case where the court below had deducted the husband's debts from his personal property and had allotted the wife only one-third of the remainder of it, the supreme court of Arkansas reversed the judgment of the court below, and among other things, said:

"As to the question of alimony, that is fixed by statute. (See Sec. 2517, Sandl. & H. Digest). The legislature seems to have enacted that statute for the purpose of putting an end to all controversies as to dower rights, and to end the matter when a divorce is granted dissolving the marital bonds. Hence the allowance to a divorced wife, who is entitled at all, is exactly or substantially the same as would be her dower interest in case of the death of her husband. * * * The court therefore erred in decreeing her only one-third of the remainder of his estate after deducting the amount of his debts, and should have allotted to her one-third of the value of his personal property, absolutely, without taking his debts into consideration, and should have given her one-third of his realty for her natural life, and ordered otherwise as the statutes require."

Beene v. Beene, 64 Ark. 522.

In a still later case, the above construction of that statute is approved, and the court uses the following language:

"This court has construed this statute to give the divorced wife, for and during her natural life, such interest and amount of his real estate as would be her dower in case of her husband's death. * * * This statute provides that the property to which the wife is entitled, shall be designated in the decree of divorce, and that it may be asserted that the statute of its own force vested in the

wife an interest in the husband's property which she could have asserted, and set apart at the time the decree of divorce was entered, or she may do so afterwards."

Hix v. Sun Insurance Co., 94 Ark. 487, 488.

In Arkansas, the courts of chancery cannot exercise any other powers in divorce cases, than are conferred by statute.

"Where by statute jurisdiction over particular subjects of equity is conferred, or given to common law courts, the entire body of law administered in courts of equity of this country attaches; but the subject of divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction; and in such cases the courts have no other powers than those expressly conferred by statute."

Bowman v. Worthington, 24 Ark. 522.

"In divorce cases the court of equity must look to and be governed by the statute, and cannot exercise inherent chancery powers not provided by statute."

Ex parte Helmert, 103 Ark. 571.

These cases, determined and adjudicated in and by the supreme court of Arkansas, construing this statute, Sec. 2684, and declaring the limitations of the powers and jurisdiction of courts of chancery of that state, are certainly controlling of those questions. In divorce and alimony cases the jurisdiction and powers of the courts of chancery are limited and controlled by the statute. And this statute, Sec. 2684, specifically provides what portion of the husband's property shall be allotted to the wife in all cases in which the divorce is granted to the wife, and against the husband. The court of chancery in Arkansas, in the divorce case, refused to take the Nebraska lands into consideration in determining the allotment to the wife, as the proof shows. The district court of York county, Nebraska, on the trial of this case, specifically found and held that said court of chancery in Arkansas did not have jurisdiction or authority to take the Nebraska lands into consideration, and did not take them into consideration in determining the allotment to this defendant in error, and the supreme court of Nebraska, upon the appeal also so

found and held. These findings are amply sustained by the proofs, as it seems to us. In view of the language of this statute, and the decisions of the supreme court of Arkansas above cited, the holding of the court of chancery of Benton county, Arkansas, that the Nebraska land was beyond its jurisdiction, was right, and an appeal from that decision would certainly have been unavailing. The holding of the supreme court of Nebraska, that the court of chancery of Arkansas was without jurisdiction to take the Nebraska lands into consideration in fixing the allottment to this defendant in error, certainly gave the judgment of said court of chancery the same "faith and credit" it had by law and usage in the courts of Arkansas. This is all that is required.

Roller v. Murray, 234 U. S. 745.

"It is well settled that where in a state court the validity of an act of the legislature of another state is not in question and the controversy turns merely upon its interpretation or consideration, no question arises under the 'full faith and credit' clause of the federal constitution."

Western Indemnity Co. v. Rupp, 235 U. S. 262, 275.
Glenn v. Garth, 147 U. S. 360.

"Where the decision of the state court involves simply the exercise of the equitable jurisdiction in accordance with the jurisprudence of the state, the ruling which prescribes the conditions of relief, is not reviewable in this court."

Holden Land Co. v. Inter-State Trading Co., 233 U. S. 536.

In the great and controlling case of *Haddock v. Haddock*, 201 U. S., at page 573, this court speaking through Chief Justice White, has declared:

"That it is elementary that where the full faith and credit clause of the constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or the person of the defendant, the courts of another state are not

required, by virtue of the full faith and credit clause of the constitution, to enforce such decree."

Under the requirements of this section of the statutes of Arkansas, Sec. 2684, where the divorce is granted to the wife and against the husband, as in this case, the Arkansas court was required to give the wife one-third of the husband's personal property, absolutely, and a life interest in one-third of his real estate. That court did not have jurisdiction to grant any interest in the Nebraska lands. The supreme court of Nebraska, so construed this section of the statutes of Arkansas. In the unanimous opinion of the supreme court of Nebraska, in passing upon the demurrer to this plaintiff's petition in this case, by Fawcett, J., it is held that the Nebraska court had jurisdiction in this case to allot to this defendant in error a reasonable sum based upon the value of the Nebraska lands of the husband. In that opinion a long line of decisions of the Nebraska supreme court is cited, establishing the jurisdiction of the Nebraska court to grant the relief prayed for in this case, under the equity powers inherent in said courts.

From this decision there is no dissent.

This court has declared:

"That the highest court of a state is the ultimate judge of the extent of its jurisdiction; and, unless a denial of federal rights is involved, its decision upon that subject is final and conclusive."

Dayton Iron Co. v. Cincinnati, Etc. R. R. Co., 239 U. S. 446, 450.

"This court will not review the judgment of the highest court of a state accepting its former decisions as determining the law of the state, and give a different interpretation of that law. To do so would give this court power to review all judgments of state courts where federal questions are set up, and to substitute its judgment for that of the state courts as to state laws."

Wood v. Cheesborough, 228 U. S. 672.

"Where the judgment of the state court rests on a matter of general law strong enough to sustain the judg-

ment, this court cannot consider the federal question involved; even if it were actually considered by the state court and determined adversely to the plaintiff in error."

Gaar Scott Co. v. Shannon, 223 U. S. 468.

"It is well settled that where the supreme court of a state decides a federal question in rendering a judgment, and also decides against plaintiff in error upon an independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Hammond v. Johnston, 142 U. S. 78.

Wood v. Cheesborough, 228 U. S. 672, 676.

Mellen v. McCafferty, 239 U. S. 134.

As suggested above, the supreme court of Nebraska, in pursuance of its uniform line of decisions, in the decision of this case, holds that by virtue of the inherent equity powers of the state district court which tried and determined the case, that court having found from the proofs that the court of chancery of Benton county, Arkansas, did not take these Nebraska lands into consideration in fixing the allotment of this defendant in error, it had jurisdiction and authority to grant this defendant in error the relief she prayed for.

This being the condition of the case as shown by the record, we contend that, as this court uniformly holds that where the decision of the state court rests upon a non-federal ground, broad enough to sustain the judgment, this court will not entertain jurisdiction of the case, and the petition or writ of error should be dismissed, or the judgment of the state court be affirmed.

II.

"A series of decisions of this court has established the rule that successive and concurrent decisions of two courts in the same case, upon a mere question of fact, are not to be reversed, unless clearly shown to be erroneous. This rule more often invoked in admiralty cases, is yet equally applicable to appeals in equity."

Towson v. Moore, 173 U. S. 24.

T. & P. Ry. v. Railroad Commission, 232 U. S. 338, 339.

Bright-Blodgett Co. v. United States, 236 U. S. 402.

As shown above, the district court of York county, Nebraska, definitely found that the chancery court of Arkansas did not take the Nebraska lands of this plaintiff in error or their value into consideration in fixing the amount of allowance made by that court in the divorce case, to this defendant in error.

The supreme court of Nebraska, hearing this case *de novo*, specifically so found as shown by the opinion by Fawcett, J., at page 49 of the printed record; and by the opinion of Sedgwick, J., page 50 of the printed record.

In view of the testimony referred to by Judge Fawcett supporting such finding, (see page 49 of printed record), it cannot be justly said such finding is shown to be clearly erroneous.

It is also found by the district court of York county, Nebraska, included in this general finding for the plaintiff, this defendant in error, as we contend, that the court of chancery of Arkansas allowed this defendant in error in the divorce suit, \$2,500.00 for money she had loaned her husband, as a part of the total amount allowed her, \$5,111.00. The supreme court of Nebraska also so specifically found, as shown by the opinion by Fawcett, J., page 46 of printed record, and by the concurring opinion of Sedgwick, J., page 50 of printed record. And it certainly cannot be contended that this finding is shown to be clearly erroneous.

This \$2,500.00 borrowed money so restored to this defendant in error and included in, and as a part of the total amount allowed her in said divorce suit, shows conclusively that the total amount of alimony allowed this faithful wife, was only \$2,611.00. And it is shown in the record, and nowhere disputed, that this plaintiff in error at the time of the divorce suit, owned \$7,000.00 of personal property, consisting of notes

bonds, mortgages and other personal property, and also a house and lots within the jurisdiction of the Arkansas court, worth \$2,500.00.

One-third of this personal property is \$2,333.33, and figuring the present value of the life estate in one-third of the value of the house and lots at only \$278.00, as was done, and this added to the \$2,333.33 aggregates the said sum of \$2,611.00 allowed as alimony. As so clearly shown in the said opinion of Fawcett, J., on page 46 of the printed record, these facts conclusively demonstrate that the court of chancery in Arkansas in the divorce suit, did not, and could not have taken the Nebraska lands or their value into consideration in fixing the amount of allowance to this defendant in error.

As stated above, the opinion of the supreme court of Nebraska, by Fawcett, J., in passing upon the demurrer to the petition of this defendant in error is a unanimous opinion. That opinion announces and declares that the Nebraska court had jurisdiction of this suit, and that the petition of this defendant in error stated a good cause of action. And while it is true that in deciding the case on the merits there is a dissenting opinion, still we challenge the attention of this court to the fact that there is no dissent from the findings of fact announced in the opinions of the majority of the court. The dissenting opinion is based entirely upon the construction of, and force to be given to, section 2681, of the Arkansas statutes, as applied to this case. We think an examination of that dissenting opinion, will convince this court that it is not a sound or well considered opinion. It ignores the various decisions of the supreme court of Arkansas above referred to construing these statutes. It entirely ignores the general rule that a specific statute upon a given subject will control as against a general statute that might include the same subject in the absence of such specific statute. It ignores the rule that the later expression of the legislative will will control the former in case they are in conflict.

It simply states in an arbitrary manner, that the earlier statute is in full force according to its original import, since it

has not been changed, modified or amended in a manner authorized by the constitution of Arkansas, in face of the fact that the supreme court of Arkansas has declared that the later statute, upon which we rely, is valid and in full force, and, "of its own force vests in the wife an interest in the husband's property which she could have asserted and set apart at the time the decree of divorce is granted, or she could do so afterwards."

Hix v. Sun Ins. Co., 94 Ark. 488.

It is based almost wholly upon an old case decided in 1828 by the supreme court of Indiana, *Fischli v. Fischli*, 1 Blackford 360. But the court will notice that in that very passage quoted from the opinion in that case, is the following:

"Guided by this principle we should naturally suppose that the decree of the circuit court in Kentucky had done all that equity and justice required between the parties, *if there is nothing in the record of their proceedings to evince the contrary, nor anything in the case to limit their authority.*"

Evidently if there had been in the record anything to "evince the contrary, or limit their authority," it could not be held conclusively that all had been done that equity and justice required. In this case, as we contend, there is that in the record "that evinced the contrary, and limited the authority" of the chancery court in Arkansas.

But as above suggested, from the findings of fact made by the district court of York county, Nebraska, and by the supreme court of Nebraska, as stated in the majority opinion, by Fawcett and Sedgwick, JJ., there is no dissent. And in view of the proofs referred to to support these findings, it cannot with justice be said that these findings are clearly shown to be erroneous. We therefore rely upon the uniform holdings of this court, that these findings will not be disturbed or reversed, but will be given full force and effect. The same faith and credit has been given to the judgment of the chancery court of Arkansas that it is entitled to in the state

of Arkansas, and we confidently ask that the judgment in the courts of Nebraska in this case be affirmed.

III.

But there is another reason why the judgment in this case should be affirmed, which we think is of controlling force.

At the trial of the divorce suit in the chancery court of Benton county, Arkansas, this plaintiff in error contended, through his counsel, that that court did not have the jurisdiction and authority to take into the consideration, in fixing the amount of this defendant in error's allowance, the lands lying and being in Nebraska. He contended with such force at said trial, that he was successful, and secured the refusal of that court to take said Nebraska lands into consideration in fixing said allowance. He cannot now successfully contend that said chancery court did have jurisdiction to take said Nebraska lands into consideration. He cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same party insist that the court did have jurisdiction of that particular property and should have adjudicated as to it in the former action and so defeat any adjudication of it entirely.

Cross v. Levy, 57 Miss. 634.

Long v. Lockman, 135 Fed. Rep. 197.

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Daris v. Wakelce, 156 U. S. 689.

IV.

In our view there is another, and still higher and even a more controlling ground or reason upon which our contention

for the affirmance of this judgment is based. The equities of the case are all in favor of this defendant in error with controlling force.

It is alleged in the petition that:

"Soon after her said marriage to defendant (plaintiff in error), he became addicted to drinking intoxicating liquors to excess, and would very frequently get drunk, and go off on a drunken spree, and this plaintiff (defendant in error), would be compelled to and did, send after him and frequently have him brought home in a drunken condition, and filthy, and plaintiff would be compelled to clean up the furniture and clothing soiled by the filth he would produce, and plaintiff did so clean up after him very frequently, and this habit of defendant continued to grow, and his drunken sprees became more frequent as the time passed, but this plaintiff continued to do her duty in her attempts to take care of defendant, and used her best endeavors to persuade and induce this defendant to cease his drunken sprees, but without avail. During such drunken sprees he became very abusive and would use coarse and indecent language to and in the presence of this plaintiff until her position became almost unbearable."

This allegation is not even denied in the answer, and the general finding of the court below in favor of this plaintiff (defendant in error), also finds this allegation to be true. The marriage took place in the month of January, 1889, and the record shows that this plaintiff continued to submit to this humiliating service, and abusive treatment until some time prior to March 1st, 1911, and until this defendant had made the gross and unfounded charge in his petition for divorce, that she was guilty of infidelity. So for twenty-two long years this plaintiff endured this abusive treatment, and humiliating service. But when this defendant, in his petition for divorce, made the gross and unfounded charge of infidelity against her, her delicate and refined nature could endure such treatment no longer; and she then for the first time, asked the court to grant her a divorce from defendant. So she spent twenty-two of the best years of her life, faithfully performing her duties as a wife to this defendant, taking care of him, and of his home; and in making it possible for him to hold this

very property in Nebraska mentioned in the record, and prevent its being wasted and squandered. There is no dispute but that this defendant at the time of the divorce decree, owned \$7,000.00 worth of personal property and a house and lots in Arkansas worth \$2,500.00, and these lands in Nebraska, which the court below found from the evidence were worth \$40,000, making in all property worth at least \$49,500.00.

The court of chancery in Arkansas allowed her \$2,611.00, when in view of twenty-two years of her life she has spent in the humiliating service and enduring the cruel treatment above suggested, and as shown by the record, she is certainly entitled to at least one-third of defendant's said property, or \$16,500.00. In view of these facts the state court below has allotted and allowed to her ten thousand (\$10,000.00) dollars. The Nebraska court holds that it has jurisdiction to revise a decree for alimony after the term at which the first allowance was made, on the petition of either party, and that it had jurisdiction to grant this additional alimony and that the only mistake made by the district court of York county, if any, was in not making a larger allowance to this plaintiff than it did.

We contend that the rights growing out of the marriage relation are the most sacred and impressive of any rights that courts are called upon to deal with or enforce. The writer of this brief feels that he cannot more effectively or forcefully express his own views in relation to the continuing duty of a husband to support her whom he has voluntarily made his wife, than to use the vigorous and expressive language of the supreme court of Wisconsin, in an opinion written by Chief Justice Ryan, who was probably the ablest judge who ever sat in that court. In that opinion Chief Justice Ryan, speaking the unanimous conclusion of that court, among other things said:

"It is urged that a statute providing for the support of the wife of the husband, after divorce *a vinculis*, is a hard statute, which should be strictly construed. It is urged that in such a case, the husband and wife are strangers; as nearly so as if they had not been married; and that calling upon a divorced husband to support his

divorced wife, out of his subsequent estate, is calling upon him to support a person standing in no relation to him, having no moral claim upon him.

"We cannot assent to such a view, or even appear to sanction it by silence. Without considering the moral effect on society of the easy rule of divorce current in our day, we take occasion to say that there are things too sacred and too steadfast in nature, for any statute, or any judgment under a statute, to affect. Judgment of divorce can sever the legal bond of marriage, but it cannot undo the natural relation which husband and wife bear to each other and to their children, cannot help but bear them, and must bear always. Statutes and judgments may control the future, but cannot cancel the past; may solve social, but cannot annul natural relations. Marriage was before human laws, and exists by higher and holier authority—the divine order, which we call the law of nature. The law and judgment of the law of the land may separate husband and wife, and set them legally free; but law or judgment cannot obliterate their cohabitation in marriage or the natural and indelible relation which cohabitation in marriage fixes on them forever. It is shocking to the moral sense of mankind to reduce the natural co-relation of man and woman in marriage to a mere partnership of sex, absolutely effaced and undone by dissolution. The natural tie of marriage is beyond the jurisdiction of divorce; as essentially without the power of the law, as the natural relation of parent and child. The power of the law over either is limited to legal relations. * * * The natural seal of affinity is upon them. They can never again be strangers on earth. * * * Our statute of divorce recognizes the natural tie and consequent obligation, and proceeds upon them, in providing for the claim of the wife, founded in marriage, to support from the husband, after divorce. We cannot regard it as a hard provision, but as a remedial and beneficent statute for the protection of natural claim founded on natural relation. And we shall not confine it to the narrow application contended for, against its spirit and intent, if the language used be fairly susceptible of larger and more liberal construction."

Campbell v. Campbell, 37 Wis. 213, 214, 215.

Further on in the same opinion this great judge said:

"It was contended in this connection, that the provision for alimony, in this case in the judgment for divorce was intended by the court below to be final. How-

veer that may be, it is very certain that the court below had not power to make it final, and could not divest itself of authority to revise it."

Campbell v. Campbell, Supra. 220.

Now it is true that Chief Justice Ryan in thus declaring the holding of the supreme court of Wisconsin, and in describing and defining the importance of the continuing validity and sanctity of the right of the wife to support and maintenance from the husband, is discussing the proper construction to be placed upon a state statute, still his forceful characterization of the sacredness and continuing character of the wife's right to such support, and the fundamental principles upon which it rests, is applicable everywhere that the marriage relation exists; and we contend that it is peculiarly applicable to the case of this plaintiff, who has spent the best years of her life in the faithful discharge of her marital duties to this defendant, under the most trying conditions and circumstances, as shown by the record in this case. We ask therefore, that the judgment of the supreme court of Nebraska, in giving effect to these fundamental principles, and in holding that it has jurisdiction to do so, be affirmed by this court.

REPLY TO THE BRIEF OF PLAINTIFF IN ERROR.

We concede that counsel for plaintiff in error, in their brief in this case, have made a very able and exhaustive discussion of the power of courts of chancery to finally and completely dispose of and determine all material questions that come within their jurisdiction, in causes brought before them. But they proceed, in their argument, upon an entirely different theory of the facts established in this case, from that for which we contend. They simply, dogmatically assert, in face of the facts shown by the record, that the court in Arkansas in the divorce case, had jurisdiction to take into consideration the Nebraska land in fixing the allowance to the wife, this defendant in error. They base that contention upon the fact that that court had both parties before it, and being a court of chancery, it could and did determine all the rights of this

defendant in error, to an allowance out of her husband's property. Their whole argument is based on that assumption. And we rely upon the foregoing parts of this brief as an ample reply to that contention. We contend that the essential premises upon which their whole argument is based, is not established, as shown by this record. In addition to what we have already said in the former parts of this brief, we rely on the following co-related propositions:

1st. The highest court of a state is the ultimate judge of the extent of its jurisdiction.

Dayton Iron Co. v. Cincinnati, Etc. Ry. Co., 239 U. S. 446.

2nd. The supreme court of Arkansas has declared that in divorce and alimony cases, the chancery courts of that state cannot exercise ordinary inherent chancery powers, and that they can only exercise the powers expressly conferred by statute.

"In divorce cases the court of equity must look to and be governed by the statute, and cannot exercise inherent chancery powers not provided by statute."

In re Helmert, 103 Ark. 571.

Bowman v. Worthington, 24 Ark. 522.

Nebraska

3rd. The supreme court of ~~Arkansas~~, conceding the validity of the decree entered in the divorce case, in the Arkansas court, disposing of such property as was within its jurisdiction, holds that it has jurisdiction to grant the wife additional alimony out of property of the husband, not within the jurisdiction of the Arkansas court.

4th. Section 2684 of the Arkansas statutes, is a specific statute, specifically providing and directing just what portion of the husband's property shall be allotted to the wife, in case the divorce be granted to her, and against the husband. This statute *of its own force rests in the wife, in case the divorce be granted to her and against the husband, a definite share of the husband's property.*

Hix v. Sun Ins. Co., 94 Ark. 487, 488.

5th. This statute of Arkansas could not, and did not vest in the wife in this case, any interest in the husband's lands in Nebraska. And the court of chancery in Arkansas, could not, and did not, invest the wife with any of the Nebraska lands, nor any interest therein.

6th. This plaintiff in error, through his able counsel, having contended in the trial of the divorce case in the Arkansas court that that court could not consider, or take into account in fixing the allotment to this defendant in error, the Nebraska lands or their value, and having succeeded in that contention, is estopped now from contending that that court did have jurisdiction to take into consideration said Nebraska lands in fixing said allotment.

7th. The equities of this case, as shown by the allegations of the petition in the case, and the findings in support of the same by the trial courts, are strongly in favor of this defendant in error's contentions.

As the court in Arkansas which tried the divorce case, although it be a court of chancery, could not exercise the inherent powers of a court of chancery in divorce and alimony cases, but was limited to the powers conferred directly by statute, the argument made, and cases cited by counsel for plaintiff in error relating to the ordinary, inherent powers of courts of chancery, do not apply to this case. And while we contend that the views of counsel are extreme, and go far beyond the holdings of the best considered cases, in discussing the jurisdiction and powers of courts of chancery, still we do not deem it necessary to further follow their argument.

In our view, this court in one of the cases cited by counsel for plaintiff in error has clearly defined the limits of jurisdiction of courts of equity, and the application of the "full faith and credit" clause of the constitution. In the case of *Fall v. Eastin*, 215 U. S., at pages 11 and 12, this court has declared:

"When the suit is strictly local, the subject matter is specific property, and the relief when granted is such that

it *must* act directly upon the subject matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject matter is situated. 3 *Pomery's Equity*, Secs. 1317, 1318, and notes.

"This doctrine is entirely consistent with the provision of the constitution of the United States, which requires a judgment in any state to be given full faith and credit in the courts of every other state. This provision does not extend the jurisdiction of the courts of one state to the property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject matter of the suit. It does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state it must become a judgment there; and can only be executed in the latter as its laws permit. *M'Elmoyle v. Cohen*, 13 Peter 312."

In the case of *Thomas v. Thomas*, 27 Okla. 784, construing a statute of that state, cites *Bowman v. Worthington*, 24 Ark. *Supra*, and quotes the holding in that case, and then adds:

"The trial court not possessing jurisdiction to entertain the question of the dispositon of this property, in the divorce proceeding, the same did not become *res adjudicata* by reason of that action, and hence is left open for adjudication in this action."

In the case of *Russell v. Place*, 94 U. S., at page 608, Mr. Justice Field, speaking for this court, said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to the operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was litigated, and upon which the judgment was rendered,—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and deter-

mined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

Then in the third paragraph of the syllabus it is stated, in that same case:

"If upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

In the case at bar, extrinsic evidence was introduced which proved that the Arkansas court did not take the Nebraska demands of the plaintiff in error into consideration, in fixing the allotment to this defendant in error, and that that court could not have done so; and the Nebraska court has so found.

In the case of *Slater v. Skirring*, 51 Neb., on page 113, it is said:

"Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to appear, not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined; and where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit; and we think, that while the authorities are conflicting, their greater weight is in favor of the view that the burden of proof is upon the party pleading the estoppel, to establish the fact of the adjudication by extrinsic evidence if necessary, and not upon the other party to show that an issue which might have been adjudicated, was not."

Counsel for plaintiff in error seems to contend that because it appears that the plaintiff below, the defendant in error here, was not a resident of York county, Nebraska, at the time her suit was commenced, the district court of York county did not have jurisdiction to entertain the suit.

But the supreme court of Nebraska holds, as decided in several cases, that in suits for alimony alone, the statute requiring residence of the plaintiff in the county in which the

suit is brought in divorce cases, does not apply, and that a non-resident plaintiff may maintain a suit for alimony alone.

Moon v. Moon, 82 Neb. 688, 689.

Cochran v. Cochran, 42 Neb. 612.

Earle v. Earle, 27 Neb. 277.

The Nebraska courts also hold that a suit for alimony and maintenance may be maintained in the district courts of the state, after divorce has been granted, and the actual relation of husband and wife has ceased to exist.

Cochran v. Cochran, Supra, 612.

Rhoades v. Rhoades, 78 Neb. 495, 497.

And in the case at bar, the supreme court of Nebraska, when the case was before it the first time, upon demurrer to the petition, in overruling the case of *Eldred v. Eldred*, 62 Neb. 613, reaffirms the holding in *Cochran v. Cochran* (see pages 14 and 15 of the printed record in this case).

And this holding, that suits for alimony may be maintained by the wife, after divorce has been granted, and the actual relation of husband and wife has ceased to exist, is declared in Ohio.

"It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. * * * It is true, the statute speaks of the allowance as being made to the *wife*. But the term 'wife' may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of *wife* for the purpose of enforcing her claim to alimony."

Cox v. Cox, 19 Ohio State 512.

This holding is reaffirmed in a later case in which the language above is expressly approved.

Woods v. Waddell, 44 Ohio State 449.

In Iowa, in a case in which a divorce had been granted in Nebraska, and the wife had sued for additional alimony in Iowa, the court among other things said:

"Counsel for appellee insist that notwithstanding the Nebraska divorce is valid, yet the plaintiff may be

awarded alimony in this state (Iowa) out of property found here. Conceding this to be true, and applicable in certain class of cases, we feel sure that the rule cannot apply to the case at bar. The divorce was granted as has been said in 1880. In November, 1881, the defendant's father died in this state, possessed of certain property which the defendant inherited. Now while it may be true that the plaintiff might be entitled to alimony if defendant had owned the property in this state at the time the divorce was procured in Nebraska, she cannot be so entitled because he has subsequently acquired property."

Van Orsdale v. Van Orsdale, 67 Iowa 65.

In Kentucky a husband brought suit against his wife for divorce on the ground of abandonment. The wife appeared and resisted the husband's application for divorce. A trial was had, and the court found for the husband and granted a divorce to him. Afterwards, both parties removed to Ohio where the wife brought suit for alimony. The husband appeared in that suit and resisted the wife's claim upon the ground that he had obtained a divorce from the wife in Kentucky, and that that suit was a bar to her present suit.

A trial was had, which was vigorously contested, but a decree was entered therein in favor of the wife for a considerable sum as alimony. The husband failed to pay the allowance so decreed to the wife. She afterwards brought suit in Kentucky where the husband had property located, to enforce the collection of said amount decreed to her by the Ohio court. The husband resisted this suit, on the ground that he had obtained a divorce from the wife in Kentucky, in a suit in which she had appeared, and that in consequence the court in Ohio which granted to her that allowance sought to be recovered, did not have jurisdiction to render the decree, and the decree was in consequence void. The lower court so held, but upon the case being appealed, the court of appeals in Kentucky reversed the holding of the lower court and held that the decree entered by the Ohio court was valid and should be enforced in Kentucky.

Rogers v. Rogers, 15 B. Monroe (Ky.) 375 to 383.

CONCLUSION.

The record shows, as we contend, that the Nebraska courts held that they had jurisdiction to entertain this case, and enter the judgment complained of, not in disregard of, or in denial of full faith and credit to the decree entered in the court of chancery of Arkansas, but in addition and supplementary thereto. The jurisdiction entertained, and the judgment entered is in strict accord with the former holdings of the Nebraska courts. As this court has so frequently declared that state courts are the sole judges of the extent of their jurisdiction, we ask that that rule be applied in this case. In view of the facts disclosed in this record, we contend that the judgment of the court below rests upon a non-federal question amply sufficient to support it. And we therefore ask that the judgment of the state courts be affirmed, or that this writ of error be dismissed.

But as this defendant in error is contending in this case for an allowance to which she is so clearly entitled out of the property in Nebraska belonging to plaintiff in error at the time the divorce was granted, and as this record shows that she has been compelled to incur large expense in thus pressing her just claim, and the judgment below is much less than was rightly due her, we ask that this court will allow her a reasonable amount as attorney's fees for services in this court.

Respectfully submitted,

SAMUEL P. DAVIDSON,
Attorney for Defendant in Error.

BATES *v.* BODIE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 120. Argued January 4, 1918.—Decided January 21, 1918.

When a case is here upon the ground that the court below denied full faith and credit to a decree of a court of another State, a motion to dismiss the writ of error based on the proposition that the decree was accorded its due value under the statutes of the State of its rendition merely begs the question in issue and must be denied.

The principles of estoppel by judgment are reviewed in the opinion and *held* to apply (*semble* with peculiar reason) to decrees for divorce and alimony.

In a court of Arkansas, a wife, by her cross bill, sought absolute divorce, return of money lent her husband, and alimony "as the facts and law warrant, and all other proper and necessary relief" alleging that her husband owned certain real and personal property, including land in Nebraska. The decree granted the divorce as prayed, adjudged that the wife recover a stated sum "in full of alimony and all other demands set forth in cross bill," recited that such judgment was rendered by the husband's consent on condition that there be no appeal, made provisions for security, which the husband complied with, and awarded her certain personal property. After the husband had paid the judgment the wife sued him in Nebraska to obtain further alimony out of the Nebraska land, claiming that the Arkansas court had no jurisdiction to take it into consideration and did not do so. *Held*, that the face of the decree, with the cross bill, showed a plenary adjudication of the liability for alimony with consent of parties; that this was confirmed by the parties' conduct, and the weight of the testimony in this case, concerning the former proceedings; that in virtue of the consent, if not under the Arkansas statutes (Kirby's Digest, §§ 2681, 2684), the decree was within the jurisdiction of the Arkansas court, and that the action of the court below in sustaining the plaintiff's contentions and not accepting the decree as an estoppel was a denial of full faith and credit.

99 Nebraska, 253, reversed.

PLAINTIFF in error, Bates, filed a complaint in divorce against defendant in error in the chancery court of Ben-

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ton County, State of Arkansas, alleging cruelty and praying for an absolute divorce.

Defendant in error filed an answer denying the charge against her and a cross complaint accusing him of cruelty.

In the cross complaint she alleged that Bates was the owner of real and personal property of the fair value of \$75,000, consisting of 320 acres of land in York County, Nebraska, which she described, and lots in Oklahoma, and alleged further that she was the owner in her own right of \$3,000, \$2,500 of which she loaned to Bates, taking his notes therefor bearing interest at 8% per annum.

She prayed for an absolute divorce, for the restoration of the money borrowed from her and "that the court award her such alimony as the facts and law warrant, and all other proper or necessary relief." The court, after hearing, dismissed Bates' complaint for want of equity and granted her a divorce, and alimony was decreed her as follows:

"It is ordered, adjudged and decreed by the court that the defendant Lucie Bates have and recover of and from the defendant [plaintiff] Edward Bates the sum of \$5,111.00 in full of alimony and all other demands set forth in cross bill which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree herein rendered."

Certain personal property, consisting of silverware and household furniture, was adjudged to her and a lien was declared on a lot in the City of Siloam Springs, State of Arkansas, and certain notes and mortgages amounting to the sum of \$2,801.06 were required to be deposited with the clerk of the court as additional security. He, however, was given the power to sell the same but required to deposit the proceeds of the sale with the clerk until the sum awarded her be paid, for which no execution was to issue for six months. It was

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also decreed "that she be restored to her maiden name . . . and that the bonds of matrimony entered into" between her and Bates "be dissolved, set aside and held for naught."

She subsequently brought this suit against him in a Nebraska state court repeating the charges of cruelty against him and the proceedings in Arkansas resulting in a decree for divorce and alimony as stated above, and "that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the State of Arkansas, and that in consequence of that fact in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into account the above mentioned property situated in York County, Nebraska. Said court was limited by the laws of Arkansas from taking into consideration said property lying in York County, Nebraska, in determining the amount of alimony that should be granted to defendant in that suit, who is plaintiff herein."

The laws of the State of Arkansas further provide, she alleged, that "where the divorce is granted to the wife each party is restored to all property not disposed of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration, or by reason thereof; and the wife so granted a divorce from the husband shall be entitled to one third of all lands of which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form."

She further alleged that the land in Nebraska was worth the sum of \$48,000, that the amount of alimony allowed her by the Arkansas decree was largely inadequate for her support and was not such a fair proportion of the property of Bates owned by him at the date of

the decree as she then was and is entitled to in view of the circumstances. She prayed that a reasonable sum be adjudged her out of the York County property in addition to the amount allowed her by the Arkansas decree. A copy of the decree was attached to the complaint.

Bates demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and, she declining to plead further, the cause was dismissed for want of equity. The judgment was reversed by the Supreme Court.

On the return of the case to the trial court Bates answered. He set up the proceedings in Arkansas and pleaded the decree and alleged that it was made upon full consideration of the evidence and the issues and that the court took into consideration the value of the land in York County, Nebraska, in determining the amount of alimony to be awarded to plaintiff. That the decree remained "in full force and effect, except that the amount of alimony awarded therein has been fully paid" by him. That the Arkansas court in awarding the alimony "took into consideration all of the property owned by" him, "which decree, so far as it relates to alimony, having been fully satisfied, has become a full and complete bar to further proceedings on the part of the plaintiff in this suit, defendant in that, to recover additional alimony under the laws of the State of Arkansas." And that, further, under the Constitution of the United States, the findings and decree are entitled to full faith and credit in the courts of Nebraska, and constitute a full and complete bar to plaintiff's right to recover additional alimony under the laws of the State of Nebraska.

It was adjudged and decreed that plaintiff (defendant in error here) have and recover from the defendant (plaintiff in error here) the "sum of ten thousand dol-

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lars, being the amount found due her as alimony." The judgment was affirmed by the Supreme Court, to review which this writ of error was prosecuted.

Mr. A. C. Ricketts and *Mr. A. W. Field*, with whom *Mr. L. A. Ricketts* and *Mr. W. L. Kirkpatrick* were on the briefs, for plaintiff in error.

Mr. Samuel P. Davidson for defendant in error.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

A motion is made to dismiss on the ground, as contended, that the decision of the Supreme Court of Nebraska was based upon a construction of the statutes of Arkansas and concluded therefrom that the District Court of Arkansas "had no jurisdiction to take the Nebraska lands of this plaintiff in error into consideration in fixing the amount of allowance to this defendant in error, and as a matter of fact did not do so." That this conclusion was reached "by reason of the peculiar statute of Arkansas which governs and controls the courts of that State in fixing the allowance of alimony to a wife, *in all cases* in which the divorce is granted *on her petition*" (italics counsel's) and the court "was limited and controlled by that statute." It is hence contended that the full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of another State was not denied to the Arkansas decree but that the Supreme Court of Nebraska, considering the statutes of Arkansas, gave to the decree the value those statutes gave to it.

But this is the question in controversy. The decision of the Supreme Court of Nebraska is challenged for not according to the decree the credit it is entitled

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to and it is no answer to the challenge to say that the Supreme Court committed no error in responding to it and that, therefore, there is no federal question for review. *Andrews v. Andrews*, 188 U. S. 14. The motion to dismiss is denied.

The decision of the Supreme Court affirming the subsequent judgment of the district court on the merits was by a divided court and the opinion and dissenting opinion were well-reasoned and elaborate. The ultimate propositions decided were that the courts of Nebraska would entertain a suit for alimony out of real estate situated in that State after a decree for absolute divorce in another State, the latter State having no jurisdiction of the land, notwithstanding the decree awarding alimony, the decree not appearing to have been rendered by consent or not having taken such land into account; and that besides the Arkansas court had no jurisdiction to render a money judgment for alimony.

The propositions were supported and opposed by able discussion, some of which was occupied in reconciling a conflict of decision in Nebraska, a later decision made to give way to an earlier one. We are not called upon to trace or consider the reasoning of the opinion further than to determine the correctness of its elements, and this determination can be made by reference to the divorce proceedings in Arkansas and the decree of the court rendered therein.

The case is not in broad compass and depends upon the application of the quite familiar principle that determines the estoppel of judgments, and the principle would seem to have special application to a judgment for divorce and alimony. They are usually concomitants in the same suit—some cases say must be—or, rather, that as alimony is an incident of divorce, it must be awarded by the same decree that grants the separation. And it is the practice to unite them, as alimony

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necessarily depends upon a variety of circumstances more adequately determined in the suit for divorce, not only the right to it but the measure of it, all circumstances upon which it depends being then naturally brought under the view and judgment of the court. Whether, however, the right to it should be litigated in the suit for divorce, or may be sought subsequently in another, the principle is applicable that what is once adjudged cannot be tried again. And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, 94 U. S. 351, 353; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252; *Troxell v. Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434; *Radford v. Myers*, 231 U. S. 725; *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294.

But how find the matters in issue or the points controverted upon the determination of which the judgment was rendered? The obvious answer would seem to be that for the issues we must go to the pleadings; for the response to them and their determination, to the judgment; and each may furnish a definition of the other. *National Foundry & Pipe Works v. Oconto Water Supply Co.*, 183 U. S. 216, 234. If there be generality and uncertainty, to what extent there may be specification and limitation by evidence *aliunde* there is some conflict in the cases. But we are not called upon to review or reconcile them. Our rule is that an estoppel by judgment is "not only as to every matter which was

offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac, supra*, p. 352. Is the rule applicable to the instant case?

We have set forth the proceedings in divorce in which, we have seen, there were charges of cruelty, and counter charges. There was display of property, prayers for divorce and a prayer in addition, on the part of defendant in error, that her husband, Bates, be required to restore a sum borrowed from her "and that the court award her such alimony as the facts and law warrant, and all other proper or necessary relief."

Responding to the issues thus made and the relief thus prayed, the court adjudged plaintiff in error guilty of cruelty, granted defendant in error a divorce and awarded her the sum of "\$5,111.00 in full of alimony and all other demands set forth in cross bill."

There were then presented the issues of divorce and alimony; the first was made absolute, the second in a specified sum "in full," and the sum adjudged to her was made a lien on his property in the State (Arkansas). We may remark that she was awarded other property. It would seem, therefore, that there is no uncertainty upon the face of the record and that it is clear as to the issues submitted and clear as to the decision upon them.

But it is answered that—(1) The court had no jurisdiction of the Nebraska lands, and (2) that besides it did not take them into account in its judgment.

(1) Counsel make too much of this point. It may be that the Arkansas court had no jurisdiction of the Nebraska lands so as to deal with them specifically, but it had jurisdiction over plaintiff in error to require him to perform any order it might make. But even this power need not be urged. The court had jurisdiction of the controversy between the parties and all that

pertained to it, jurisdiction to determine the extent of the property resources of plaintiff in error and what part of them should be awarded to defendant in error. It was not limited to any particular sum if it had jurisdiction to render a money judgment at all.

But such jurisdiction does not exist, the Supreme Court of Nebraska decides and counsel urges. The argument to sustain this is that the Arkansas statute¹ (§ 2684, Kirby's Digest) provides that when a divorce is granted to the wife the only power the court possesses is to restore to the parties respectively the property one may have obtained from the other during the marriage and adjudicate to the wife one-third of her husband's personal property absolutely and one-third of all the lands whereof he was seized of an estate of inheritance at any time during the marriage for her life unless she shall have relinquished the same in legal form. In other words, against a guilty husband the courts of Arkansas were without power to render a money judgment for alimony, but were confined to an allotment of his personal property and real estate in the proportions stated. But the court was confronted with the question of the relation of that section to § 2681 of the Digest, which provides that "when a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall

¹ "And where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest, § 2684, [1904].

be reasonable." In answer to the question the court decided that the latter section is applicable only when a divorce is granted for the fault of the wife.

Plaintiff in error contests the conclusion and strong argument may be made against it to show that the sections are reconcilable and each applicable to particular conditions. And such was the view of the dissenting members of the court. However, we are not called upon for a definitive decision on account of the view we entertain of proposition 2 and the reason which, we think, induced the court to render a money judgment.

(2) This proposition is based on the record which, the Supreme Court said, "shows that the court [Arkansas court] did not in fact make any allowance on account of the Nebraska lands," and resort is had to parol testimony for the purpose of limiting the decree. But we cannot give the testimony such strength. It is conflicting. It consists of the impressions of opposing counsel and of the parties of the opinion of the court orally delivered in direction for the decree.

The Bodie version is supported by the clerk of the court, whose recollection was that the court did not take into consideration "the land outside of Benton County." But he further testified that there was testimony of the rental value of the Nebraska lands and that "the chancellor announced that while he did not have jurisdiction over the lands in Nebraska, he did have jurisdiction over the person of Bates, as he was personally present in court. The court required Bates to deposit security for the payment of the alimony awarded. . . . As I recollect it the decree rendered was on the consent of Bates on condition that Bodie would not appeal."

On the Bates side is the evidence of the chancellor, whose opinion was the subject of the testimony of the others. He was specific and direct and the following, in summary, is his testimony: Depositions were intro-

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duced showing the value of and rental income from the Nebraska lands, which were supposed to be in the name of Bates' children or in his name as trustee for his children. The decree for alimony was a lump sum of \$5,111.00 "in lieu of any interest that she might have or claim she might have for any sum." (It does not appear from what this is a quotation—probably from the witness' opinion.) He, the witness, intimated what he would do in the way of a property finding and the parties agreed upon a lump sum as a final settlement, from which no appeal was to be taken. His view was that the court had jurisdiction of the parties, and held it had not of the land in Nebraska, but it did have jurisdiction to consider its value in determining the amount of alimony. Knowing, as he testified, the law, he did not think he stated that there was no law justifying the court to take into consideration the Nebraska lands. It was not the first time the proposition had been raised before him.

He remembered that Bodie claimed \$2,500 as borrowed money, but the money had merged in Bates' estate. He did not understand that it entered in the decree. It was a lump-sum agreement provided cash could be got to end the controversy both as to divorce and as to property rights. Counsel adjusted it on the outside, for he was quite sure that it was not the amount the court indicated it would allow. The court understood that counsel on both sides agreed to the amount; that the judgment was a complete and amicable settlement between the parties of all property rights involved.

We must ascribe to the representation of the decree the same judicial impartiality that induced its rendition and the representation was circumstantial, without material qualification, doubt or hesitation. It accords besides with the issues in the case and the decree. As we have seen, the amount it awarded was "in full of alimony and all other demands set forth in cross bill."

It also recited that it was "rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree." The amount was secured, as the chancellor declared he would secure it; it was paid as it was required to be paid.

The evidence, therefore, confirms the face of the decree and that it was rendered by consent of the parties. It is admitted that consent would give jurisdiction to the court to render a money judgment for alimony.

We think, therefore, that due faith and credit required by the Constitution of the United States was not given to the decree.

The judgment of the Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.
